Supreme Court, U. S.
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80-181

No.

IN THE

Supreme Court of the United States

——— TERM, 1980

State of Missouri ex rel.
Minnie E. T. Gore, and
Jennye Robinson,
Petitioners

vs.

R. Dean Wochner, M.D., et al
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Eight Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This cause presents the following questions of interest and importance which warrant (and require) the attention of this Honorable Court, to-wit:

A. What violations of state and municipal laws, enacted to insure the orderly administration of tenured civil service within a municipal corporation, constitute an "infringment" of acknowledged federally protected rights sufficient to plead a claim under 42 U.S.C. §1983?

B. When does the widespread malfeasance, misfeasance, and nonfeasance in the enforcement of the regulatory procedures established by city charter and ordinances to secure and promote the civil service within a municipal corporation rise to the level of a federal constitutional violation by the municipal corporation and its executive officers under 42 U.S.C. §1983 after *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658?

C. Whether the opinion of the Eighth Circuit Court of Appeals erroneously interprets *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 for the reasons that *Monell* dealt with a municipal corporation's liability for constitutionally impermissive conduct which may be fairly said to constitute the policy, custom, or usage of the corporation itself, whereas, the Court below held that the gross deviation of mandatory procedures by various interrelated department heads as they "touch and effect" plaintiffs' acknowledged federally protected rights does not state a cause of action under 42 U.S.C. §1983?

D. Does the opinion of the Eighth Circuit below directly conflict with controlling Missouri case law interpreting 42 U.S.C. §1983 as enunciated in *Tyler v. Whitehead*, 583 S.W. 2d

240 (Mo. App. 1979); the Supreme Court of Missouri having previously held that state courts have concurrent jurisdiction of 42 U.S.C. §1983 claims as stated in *Shapiro v. Columbia Union National Bank and Trust Company*, 576 S.W. 2d 310, 316, (Mo. Banc 1978)?

E. Whether the opinion of the Eighth Circuit Court of Appeals is in conflict with *Sigler v. Lowrie*, 404 F. 2d 659, 662 (8th Cir. 1968) cert. denied 395 U.S. 940 (1969) in that *Sigler* dealt with rights derived *solely* from state law, but the Court below, in the instant case, while acknowledging that federally protected rights are properly plead, held that the plead violations of state law which underpin and enumerate said protected rights do not state a cause of action sufficient to plead a claim under 42 U.S.C. §1983?

F. Whether the opinion of the Eighth Circuit Court of Appeals is in conflict with *Boyer v. Wisconsin*, 345 F. Supp. 564 (E.D. Wisc. 1972) in that *Boyer* held the violation of state law which results in an infringement of a federally protected right states a cause of action under 42 U.S.C. §1983, but the Court below, in the instant case, determined no cause of action exists, as plead, even while it stated that properly raised federally protected rights were plead; but pervasive violations of state laws which touch and effect the orderly administration of those rights is not actionable under 42 U.S.C. §1983?

G. What gross deviations from an integrated statutory scheme of state and local laws establishing the administrative appellate rights of employees within the tenured civil service is actionable under 42 U.S.C. §1983 in light of *Monell* when the city counselor's office of a municipal corporation represents an appointing authority who allegedly tendered and then subsequently represented a civil service commissioner who allegedly accepted a bribe to deny admitted federally protected

rights at a time when said city counselor was the statutory lawyer for other department heads whose alleged misfeasance, malfeasance, or nonfeasance casually contributed to the success of the bribe in question?

STATE OF MISSOURI, ex rel.
MINNIE E. T. GORE, and JENNYE ROBINSON,
Petitioners

vs.

R. DEAN WOCHNER, M.D., individually and in his official capacity as the Director of the Department of Health and Hospitals for the City of St. Louis, *and* FRED GOULD, individually and in his official capacity as a Civil Service Commissioner for the City of St. Louis, *and* DAVID V. ESSEX, SR., individually in his official capacity as a Civil Service Commissioner for the City of St. Louis, *and,* CHARLES MARINO, individually and in his official capacity as a Civil Service Commissioner for the City of St. Louis, *and,* JOHN POELKER, individually and in his former official capacity as the Mayor of the City of St. Louis, *and* JOHN BASS, individually and in his former official capacity as the Comptroller for the City of St. Louis, *and,* R. ELLIOTT SCEARCE, individually and in his former official capacity as the Director of the Department of Personnel for the City of St. Louis, *and* JAMES CONWAY, individually and in his official capacity as the Mayor of the City of St. Louis, *and,* RAYMOND PERCICH, individually and in his official capacity as the Comptroller for the City of St. Louis, *and,* WILLIAM DUFFE, individually and in his official capacity as the Director of the Department of Personnel for the City of St. Louis, *and,* ROBERT CUMMINGS, individually and in his official capacity as a Civil Service Commissioner for the City of St. Louis, *and,* THE CITY OF ST. LOUIS, a municipal corporation, *and,* THE CIVIL SERVICE COMMISSION, a municipal agency established under the Charter of the City of St. Louis, *and* THE DEPARTMENT OF PERSONNEL, a municipal department under the municipal corporation of the City of St. Louis, *Respondents.*

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PETITION FOR WRIT OF CERTIORARI

MINNIE E. T. GORE and JENNYE ROBINSON, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, rendered in the above-captioned case on April 15, 1979. Appellants' Motion for Rehearing En Banc was denied on May 8th, 1980.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit is reported at 620 F2d 183. The opinion is

printed in the Appendix (A) hereto, filed on April 15, 1980. The opinion of the United States District Court of the Eastern District of Missouri is reported at 475 F. Supp. 274. The opinion is printed in the Appendix (B) hereto, filed June 29, 1979.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 15, 1980. (See Appendix A.) A timely Motion for Rehearing was denied on May 8th, 1980. (See Appendix F.) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §2101 c.

STATUTE INVOLVED

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for for redress.

R.S. § 1979

STATEMENT OF THE CASE

Petitioners, Minnie E. T. Gore, former Director of the Municipal School of Nursing of the City of St. Louis, and Jennye Robinson, former staff instructor at said School, were tenured civil service employees in June, 1973. On June 25, 1973, R. D. Wochner, Director of the Department of Health and Hospitals and petitioners' "appointing authority" within the framework of the Civil Service structure of the defendant City of St. Louis, dismissed both employees for alleged misconduct, improprieties, and incompetency with respect to both their

qualifications and the performance of duties within their employment. A timely appeal was pursued before the Civil Service Commission of the City of St. Louis.

Petitioners were afforded an adversary hearing before a three member panel known as the Civil Service Commission. Petitioners were represented by an attorney of their choice and petitioners' "appointing authority", Dr. R. D. Wochner, was represented by a City Counselor of the defendant City of St. Louis. Extensive hearings lasting two (2) years were held and, in an unanimous opinion, the Civil Service Commissioners, in their capacity as the triers of fact, upheld petitioners' dismissal and ratified the position of their appointing authority, Dr. R. D. Wochner. Prior to the decision, but after the case had been submitted to the Commission for decision and unbeknown to petitioners; secret meetings were held between Dr. Wochner and the chairman of the Civil Service Commission, one Charles Marino. As Chairman of the Commission Mr. Marino, though not a lawyer, had acted in a capacity analogous to that of a law judge. As a result of the secret meetings and prior to a formal vote of decision by the full commission, Dr. Wochner orally offered to Marino a position entitled, "Executive Assistant to the Director of Health and Hospitals." Dr. Wochner was then the "Director of the Department of Health and Hospitals" and acceptance of the position made Marino the doctor's executive assistant. This offer occurred prior to October 14, 1975, the day on which the full commission voted on the case previously submitted to it. The Commission's decision unanimously against the petitioners was published on October 17, 1975.

The position, as offered by Dr. Wochner, was not within the organizational structure of the Department of Health and Hospitals of said defendant municipality as required by the Civil Service Regulations and the City Charter. On October 20, 1975, petitioners learned of the Commission's unanimous ruling and the fact that Charles Marino had begun his employment in the Department of Health and Hospitals. His employment continued for two (2) years in said capacity.

Petitioners filed suit on March 22, 1977, alledging that a bribe had occurred between defendants Wochner and Marino in violation of their civil rights under 42 U.S.C. §1983 and 28 U.S.C. §1343 and prayed judgment for actual, special, and punitive damages, job reinstatement, attorney's fees, and costs. On June 9, 1978 petitioners filed their first amended complaint in three counts naming additional party defendants, including the City of St. Louis. Count One reiterated the alleged bribe between Wochner and Marino; Count Two was against the performance bond carrier of each defendant for their act of oppression in office; and Count Three was against the municipal corporation, City of St. Louis, for alleged misfeasance, malfeasance, and nonfeasance of various department heads in their respective treatment of petitioners as their activities touched and effected the Civil Service Appeal of petitioners and their knowledge of the improprieties of defendants Wochner and Marino which petitioners alledge ripened into an unconstitutional "custom and practice" of said municipal corporation.

After a Motion for Summary Judgment was granted as to the performance bond carrier and a Motion to Dismiss was was sustained as to the City of St. Louis, the trial court granted the remaining defendants' Motion For a Mistrial as to whether Plaintiffs' damages were proximately caused by the acts of the defendants; this occurred after 3½ days of trial on August 11, 1978. On October 17, 1978, petitioners lodged their Second Amended Complaint in ten counts and, on November 22, 1978, the trial Court granted leave to amend. The Second Amended Complaint is attached at Appendix G.

Beginning with the alledged arbitrary and capricious termination by the defendant Dr. Wochner, petitioners alledge that each party-defendant, all of whom were either department heads within the structure of the municipal corporation of Defendant City of St. Louis or one of its elected officials, had

knowledge of the progress of petitioners' appeal as it wound its way through the appellate process. Further, they did wilfully and intentionally fail or refuse to perform their respective specific duties, which were mandatorily imposed by law under applicable charter and/or ordinance provisions, directly and proximately causing petitioners to lose their federally protected rights under color of state law.

As tenured employees within the civil service of said municipal corporation, petitioners were afforded the protection of an elaborate statutory scheme of state statutes, city charter, ordinances, Civil Service rules, and regulations to guarantee their due process rights if a dispute arose concerning their employment. Petitioners' ten count complaint alledges the respective malfeasance, misfeasance, and nonfeasance of each party-defendant as their individual duties touched and effected petitioners' appeal and the corrupt bargain which was effecuated against them by both Wochner and Marino. Further, petitioners contend that the knowing acquiesence in said corrupt bargain by the respective interrelated department heads constituted an unconstitutional policy, custom, practice, and procedure of the City of St. Louis.

The Trial Court dismissed nine of ten counts of petitioners' Second Amended Complaint. See 475 F. Supp. 274 (App. B), Counts I-IV, VI-X were dismissed for failing to state a claim under 42 U.S.C. §1983 as to several counts and a statute of limitations bar as to others under Missouri's applicable law. A timely Rule 54(b) F.R.C.P. request was made and granted. See (App. D.) The petitioners abandoned all allegation of error as to Count IX on appeal and the respondent admitted the speciousness of the Statute of Limitation issue before the Eighth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

This matter is before this Honorable Court on the question of whether petitioners have properly plead a cause of action in eight counts pursuant to 42 U.S.C. §1983. A Rule 54(b) F.R.C.P. request was certified by the trial court and the instant appeal ensued. See (App. D.) The Eighth Circuit Court of Appeals adopted the trial court's opinion that, even though petitioners had properly plead specific federally protected rights; alleged malfeasance, misfeasance, or nonfeasance by the various interrelated department heads within a municipal corporation as their statutorily mandated duties touched and effected petitioners' rights; said pleading failed to state a cause of action under 42 U.S.C. §1983. Petitioners feel that the Eighth Circuit Court of Appeals has taken an unduly restrictive view of the procedural reality which confronted petitioners and this Honorable Court's decision in both *Monell*[1] and *Owens*[2]. The Eighth Circuit Court of Appeals determined that alledged widespread violations of a statutory scheme of state and local laws, enacted to structure and define procedural rights of aggrieved individuals before an administrative hearing tribunal to permit said aggrieved parties to secure protection for their federally protected rights, did not state a cause of action. This leaves petitioners without a forum in which to adjudicate their federal constitutional rights. This is especially true when the statutory scheme in question was specifically enacted to insure and guarantee tenured civil servants certain rights found by the trial court to be federally protected.

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[1] *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978)

[2] *Owens v. City of Independence, Missouri*, 560 F2d 925 (8th Cir. 1977) on remand, 598 F2d 335 (8th Cir. 1979), ——— U.S.——— 78-1779 (April 16, 1980)

However viewed, the holding of the Court below is considerably more restrictive in its interpretation of §1983 than Missouri courts. In *Tyler v. Whitehead*, 583 S.W. 2d 240 (Mo. App. 1979), the Kansas City Court of Appeal reversed the dismissal of a complaint on the grounds that the pleading before the court did state a cause of action under §1983 from a narrow, but critical, complaint which attacked how a county sheriff exercised his discretion in assigning prisoners their place within the confines an an antiquated jail.

Petitioners' position can not be understood without refering this Honorable Court to Count V still pending before the district court. There, petitioners allege that a corrupt bargain was entered into by a department head of a municipal corporation and the chairman of the Civil Service Commission of said corporation, the intent and purpose of which was to adversely rule against petitioners' then pending appeal for reinstatement to their former positions within the department in question. Struck *sua sponta* by the district court was paragraph 16 of Count V which stated that throughout the appellate process, the City Counselor's Office of the defendant municipal corporation had provided gratuitous legal services for both the department head and the commissioner involved in the corrupt bargain; and, by virtue of said relationship, the City Counselor was in a position to observe the bribe and its rippling effect within the corporate structure and its officers.

The Court of Appeals decision adopts *in toto* the position taken by the district court that, while petitioners have properly plead a federally protected property right in their continued employment and a liberty interest in the safeguarding their reputation, honor, and integrity so as to warrant the protection of the due process clause of the 14th Amendment of the United States Constitution in the termination of their employment; the alleged violations of statutorily mandated duties by interre-

lated department heads as they touched and effected petitioners' procedural rights during petitioners' attempt to vindicate those rights, does not rise to the level of a constitutional protection. Compare Appendix A with App. B or 620 F 2d 183 (8th Cir., 1980) with 475 F. Supp.274(E.D. Mo. 1979). Petitioners feel such a view separates the reality of the interrelationship of duties imposed upon officeholders by the defendant municipal corporation's own laws from the clearly found and articulated federal protection of petitioners' constitutional rights.

It is universally recognized that §1983 suits are expressly designed to provide "... a broad remedy for the violation of federally protected rights..." *Monell* 436 U.S. at 685, 98 S. Ct. at 2033. Pleadings are to be afforded liberal construction mandated by Rule 8(a) F.R.C.P. and, when confronted with a motion to dismiss under Rule 12(b) (6) F.R.C.P., the court must assume as true the allegations of facts contained therein and any reasonable inferences to be drawn from said facts. See *Gomez v. Toledo,* ——— US ——— 79-5601 (May 27, 1980).

Petitioners feel that the Eighth Circuit has erroneously relied on *Sigler v. Lowrie,* 404 F. 2d 659 (8th Cir.1968) cert. denied 395 U.S. 940 (1969) and *Boyer v. Wisconsin,* 345 F. Supp. 564 (E. D. Wisc. 1972) since both cases are premised on a finding that no federally protected right was, in fact, encroached upon. In the instant case, petitioners' federally protected rights were specifically held to have been properly plead by the district court. Yet, pleading wholesale violations of state laws which touch and effect the process enacted to administratively preserve and promote those same federally protected rights are held not actionable under 42 U.S.C. §1983 by the Eighth Circuit Court of Appeals. Such a holding belies the procedural reality of the administrative appellate process in which peti-

tioners' were confronted and were by state law required to follow.

On the one hand, the Eighth Circuit states that "a violation of state law that results in an *infringement* of a federally protected rights is actionable," under §1983 citing *Boyer v. Wisconsin*, supra, and *Screws v. U.S.*, 325 U.S. 91, 65 S. Ct. 1031 (1945); but then went on to hold that violations of state law occurring during the administrative appeals process *adjudicating* petitioners' admitted federally protected rights do not *rise* to the level of a federal violation. Petitioners are at a loss to discern the difference between a state law violation that infringes upon a federally protected right and a state law violation that infringes a federally protected right, which doesn't rise to the level of a federal violation.

Pivotal to petitioners pleadings before this Honorable Court is the appreciation of reasonable inferences raised by Count V.

Petitioners allege that a bribe occurred between a department head and a civil service commissioner of defendant city, the avowed purpose of which was to contravene petitioners' federally protected rights. The said bribe occurred under the scrutiny of the defendant city's attorney, the city counselor. After publication of both his resignation as a commissioner to accept this unauthorized position and his decision affecting petitioners' appeal, knowledge of this activity filters throughout various levels of responsibility without anyone moving to correct the abuse, especially the city counselor, see *Rule 4.*

DR 7-102, (A) 6-8 and (B) 1 and 2 *(S.C.Mo.1980)* [3]. A course of conduct by all departments within the executive branch of the municipal corporation, which ratifies or obscures the constitutionally impermissive conduct, ensues. Petitioners allege that the city counselor's role constitutes actual knowledge as the statutory agent for the corporate principal.

The acts complained of in the eight counts in question were at such a variance from established procedures that ministerial functions normally handled by second level functionaries were curiously omitted or tolerated by all departments over a two year period without question. The only reasonable inference to

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[3] DR 7-102. Representing a Client Within the Bound of the Law.

(A) In his representation of a client, a lawyer shall not:

6. Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false..

7. Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

8. Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A Lawyer who receives information clearly establish- that:

1. His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

2. A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

be drawn from that tolerance or omission is that it was done deliberately, with approval of the various department heads, in direct contravention of petitioners' employment rights or in support of the oppression in office as alleges. Yet the Eighth Circuit Court of Appeals states:

> "... that the violation of any rights that might arise exclusively by failure to comply with some of the procedures provided by city charter, ordinances, and regulations thereunder, do not rise to the level of a federal constitutional violation."

Finally, petitioners feel that the Eighth Circuit Court of Appeals has erroneously interpreted *Monell,* supra, and *Owens v. City of Independence,* supra. Assume in aguendo, which petitioners do not, that individual acts alleged were properly held not to have stated a cause of action against the various officeholders in question; what collective responsibility does the corporate entity, City of St. Louis, have as a result of the various acts of oppression in office visited upon petitioners during the administrative appellate process. Certainly *respondeat superior* has no relevance in a discussion about the knowing acquiesence by members of the executive branch of a municipal corporation in a bribe. Do not the individual acts of all the party-defendants, which contributed to the totality of petitioners' problem, constitute the corporation's *modus operendi* in their treatment of the petitioners. Does not the city counselor's role provide the implicit authorization, approval, and acquiescence found wanting in *Rizzo v. Godde,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2 561 (1976). See also *Leite v. City of Providence,* 463 F.Supp. 585 (1978).

As set forth last term by this Honorable Court in *Owens v. City of Independence:* ——— U.S. ——— (April 16, 1980) 100 S.Ct. 1398, 1410 (1980):

"There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatisie on the Law of Negligence §120, at 139 (1869) hereinafter Shearman & Redfield).

Accord, 2 Dillian §764, at 875 ("But as respects municipal corporation proper, . . . it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties.") (emphasis in original). See 18 E. McQuillin, Municipal Corporations §53.02 (3d rev. ed. 1977) (hereinafter McQuillin). Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused by its trespasses and uncompensated takings.

CONCLUSION

The interpretation of 42 U.S.C. §1983 in light of *Monell* and the oblique view of the procedural reality confronting petitioners in the administrative appellate process as outlined suggests the Eighth Circuit Court of Appeals has little understanding of the interrelated function of various departments in a municipal corporation. To allow the Eighth Circuit Court of Appeals to erroneously apply both *Sigler,* supra, and *Boyer,* supra, is to allow that Court to judicially determine not only *what* state law violations infringe a federally protected right, *but* also to determine *when* that infringement rise to the level of a federal constitutional violation sufficient to give a federal forum for vindication (pleaders emphasis).

Petitioners request this Honorable Court to review the issues highlighted heretofore to correct a manifestly erroneous application of law and provide some guidelines for the district court concerning the municipality's tort liabiliay in the instant case.

Respectfully submitted,

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APPENDIX

(Appendix "A")

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 79-1759

STATE OF MISSOURI, EX REL.
MINNIE E. T. GORE, JENNYE ROBINSON,

Appellants,

v.

R. DEAN WOCHNER, M.D., ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 13, 1980
Filed: April 15,1980

Before BRIGHT, ROSS and ARNOLD, Circuit Judges.

ROSS, Circuit Judge.

Appellants Minnie Gore, former Director of the Municipal School of Nursing, and Jennye Robinson, a former staff instructor at the school, allege violations of their civil rights under 42 U.S.C. § 1983 resulting from the termination of their employment with the Department of Health and Hospitals of the City of St. Louis. In the district court,[1] appellees moved to dismiss appeallants' second amended complaint on the basis that it failed to state a cause of action and that the statute of

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[1] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

limitations had run as to some defendants. The district court granted the motion as to Counts I through IV, and Counts VI through X and directed that the dismissal of these counts be entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Appellants now appeal this dismissal. We affirm.

Count I of the second amended complaint basically challenges the truthfulness of charges levied against appellants by Wochner as reasons for their dismissal. Additionally Count I alleges that the former Mayor of St. Louis, by acts of omission, permitted Wochner's conduct in making these malicious charges to exist. Counts II, III, IV, VI, VII, VIII and X allege various failures of city officials to perform their required duties resulting in appellants' failure to keep or recover their jobs and their failure to be vindicated. Count IX alleges failure of officials to require city appointees to post a bond as allegedly required by state statute. Appellants abandoned any claim of error in their brief and at oral argument with respect to the district court's ruling in Count IX. Appellants alleged in Count V that their appointing authority, Director R. Dean Wochner, induced appellee Charles Marino to uphold the firing of appellants in their appeal to the Civil Service Commission of which Marino was Commissioner. Appellee Wochner allegedly did so by promising Marino a position as Wochner's assistant. Count V was not dismissed by the district court.

In order for appellants to bring a claim under 42 U.S.C. § 1983, a specific and articulable constitutional right must have been transgressed and a cognizable claim for relief must be stated on the face of the pleading. *Landrum v. Moats,* 576 F.2d 1320, 1324 (8th Cir.), *cert. denied,* 439 U.S. 912 (1978). Rights which derive solely from state law, however, cannot be the subject of a claim for relief under 42 U.S.C. § 1983,

Sigler v. Lowrie, 404 F.2d 659, 662 (8th Cir.), *cert. denied,* 395 U.S. 940 (1969). Only when a violation of state law results in an infringement of a federally protected right can a cause of action be said to exist. *Boyer v. Wisconsin,* 345 F. Supp. 564 (E.D. Wis. 1972). See *Screws v. United States,* 325 U.S. 91, 108, 65 S.Ct. 1031 (1945). "A violation of a federal constitutional provision must be shown." *Ortega Cabrera v. Municipality of Bayamon,* 562 F.2d 91, 102 (1st Cir. 1977).

The district court found that appellants had sufficiently pleaded a property interest in continued employment and a liberty interest in the safeguarding of their reputation, honor and integrity so as to warrant the protection of due process of law, as provided by the fourteenth amendment, in their termination from employment. See *Churchwell v. United States,* 545 F.2d 59, 62 (8th Cir. 1976); *Ampleman v. Schlesinger,* 534 F.2d 825, 827-28 (8th Cir. 1976). This protection, the court determined, affords appellants notice of the charges, a hearing on the merits before an impartial body, a chance to be represented and confronted with witnesses, and a decision based on some substantial evidence, citing *Buggs v. City of Minneapolis,* 358 F.Supp. 1340, 1344 (D.C. Minn. 1973). The Supreme Court has stated that "where a person's good name, reputation, honor or integrity is at stake * * * notice and an opportunity to be heard are essential." *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972).

As appellants had notice and a hearing before the Civil Service Commission, which hearing consisted of 18 sessions from 1973-1975, the district court correctly concluded that appellants did not seek redress for any federally protected right. We agree with the conclusion of the court that the violation of any rights that might arise exclusively by failure to comply with some of the procedures provided by city

charter, ordinances and regulations thereunder, do not rise to the level of a federal constitutional violation.

We therefore affirm the decision of the district court as to the dismissal of Counts II through IV, Counts VI through VIII, and Count X on the basis that none of the dismissed counts state an issue of constitutional dimension to enable a claim to be stated under 42 U.S.C. § 1983. We further believe that for the same lack of alleged constitutional violation, the district court correctly dismissed Count I. Count IX has been abandoned on appeal. The only apparent count which, if it could be proved, might present a claim under section 1983 is the bribery charge of Count V. We must remark, however, that we fail to understand why this count was singled out and this appeal permitted to reach this court in such a piece-meal fashion. It would have been preferable for the trial court to require the trial of Count V rather than certifying the appeal under Rule 54(b) of the Federal Rules of Civil Procedure. The judgment of the trial court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Appendix "B")

United States District Court, Eastern District of Missouri
Eastern Division

STATE OF MISSOURI, ex rel.,
MINNIE E. T. GORE, and JENNYE ROBINSON,
Plaintiffs,

v.

R. DEAN WOCHNER, M.D., et al.,
Defendants.

No. 77-305 C (4)

ORDER

This matter is before the Court on the motion of defendants to dismiss. After consideration of the matter, and in accordance with the Memorandum filed this date and incorporated herein,

IT IS HEREBY ORERED that defendants' motion be and is GRANTED.

IT IS FURTHER ORDERED that Counts I, II, III, IV, VI, VII, VIII, IX, and X be and are DISMISSED as to all defendants therein named.

Dated this 29th day of June, 1979.

EDWARD L. FILIPPINE,
United States District Judge

United States District Court, Eastern District of Missouri
Eastern Division

STATE OF MISSOURI, ex rel.,
MINNIE E. T. GORE, and JENNYE ROBINSON,
Plaintiffs,

v.

R. DEAN WOCHNER, M.D., et al.,
Defendants.

No. 77-305 C (4)

MEMORANDUM

This matter is before the Court on the motion of defendants to dismiss plaintiffs' Second Amended Complaint. Defendants claim that the complaint, brought pursuant to 42 U.S.C. § 1983, fails to state a cause of action against certain of the defendants, and that the statute of limitations has run as to others. After careful consideration of the matter, it is the opinion of the Court that defendants' motion must be granted.

On June 25, 1973, plaintiffs Gore and Robinson were dismissed from their positions as Director of the Municipal School of Nursing and as a staff teaching nurse at that school by defendant R. Dean Wochner, Director of Health and Hospitals for the City of St. Louis. Plaintiffs were informed of their right to appeal Wochner's actions to the Civil Service Commission of the City of St. Louis, and on October 5, 1973, hearings were commenced on plaintiffs' appeals.

A decision upholding defendant Wochner's actions was rendered by the Commission on October 14, 1975. On October 20, 1975, defendant Charles Marino, a Civil Service Com-

missioner at the time the decision was rendered, accepted a position with the City of St. Louis as an assistant to R. Dean Wochner.

Plaintiffs first filed their 42 U.S.C. § 1983 action against defendants Wochner, Marino, Duffe, and the John Doe Insurance Company on March 22, 1977. A first amended complaint was filed on June 9, 1978, and named as defendants were Wochner, Marino, Reliance Insurance Company, the City of St. Louis, Mayor Conway, Comptroller Percich, and Paul Simon, president of the St. Louis Board of Aldermen. As indicated by the record before the Court, a second amended complaint was brought to this Court for leave to file on October 17, 1978, and was actually filed after said leave was granted on November 22, 1978. For purposes of this motion, the Court will consider the second amended complaint as having been filed on October 17, 1978. The second amended complaint names as defendants those persons hereinafter discussed in light of defendants' motion to dismiss.

In the case at bar, the central allegation is that defendant Wochner induced defendant Marino to uphold his firing of the plaintiffs in the appeal to the Civil Service Commission by promising Marino a position as his (Wochner's) assistant. Plaintiffs further allege in Counts II, III, IV, VI, VII, VIII and X various failures of city officials to perform their duties, all of which are alleged to have denied plaintiffs due process of law. Plaintiffs also claim that if the city officials had done their jobs, then the irregularity of the hiring of defendant Marino by defendant Wochner would have been discovered, and plaintiffs vindicated.

42 U.S.C. § 1983 authorizes a civil suit for damages for violation of rights secured by the United States Constitution and laws. Rights which derive solely from state law, however,

cannot be the subject of a claim for relief under 42 U.S.C. § 1983. *Sigler v. Lowrie,* 404 F.2d 659, cert. den. 395 U.S. 940 (8th Cir. 1968); *Papish v. Board of Curators of the University of Missouri,* 331 F.Supp. 1321 (W.D.Mo. 1971), aff'd. 464 F.2d 136; rev'd. on other grounds 410 U.S. 667, reh'g. den. 411 U.S. 960; *Parkway Bank & Trust Co. v. City of Darien,* 43 Il.App.3d 400, 357 N.E.2d 211 (Ill.App. 1976). It is only when a violation of state law results in an infringement of a federally protected right that a cause of action may be said to exist. *Boyer v. State of Wisconsin,* 345 F.Supp. 564 (E.D. Wisc. 1972).

Plaintiffs have sufficiently pleaded, for the purpose of this motion, a property interest in continued employment and a liberty interest in the safeguarding of their reputation, honor, and integrity so as to warrant the protection of due process of law, as provided by the Fourteenth Amendment, in their termination from employment. See *Churchwell v. United States,* 545 F.2d 59 (8th Cir. 1976); *Ampleman v. Schlesinger,* 534 F.2d 825 (8th Cir. 1976); *Williams v. Jones,* 562 S.W.2d 391 (Mo. App. 1978). The due process clause may thus be invoked to protect plaintiffs as public employees from an improper manner of discharge. *Birnbaum v. Trussel,* 371 F.2d 672 (2d Cir. 1966).

The protection afforded by the Fourteenth Amendment due process clause requires that, where injury to reputation is at stake, the discharged employee be granted a hearing that provides the employee with an opportunity to clear his good name. *Vorbeck v. McNeal,* 560 S.W.2d 245 (Mo.App. 1977). See also *Board of Regents v. Roth,* 408 U.S. 564 (1972). Where the suspension or termination is based on allegations of misconduct, due process requires that there be notice of the charges, a hearing on the merits before an impartial person or body, a chance to be represented and confronted with wit-

nesses, and a decision based on some substantial evidence. *Buggs v. City of Minneapolis,* 358 F.Supp. 1340 (D.C.Minn. 1973). See also *Dennis v. S & S Consolidated Rural High School District,* 577 F.2d 338 (5th Cir. 1978).

The allegations that plaintiffs make regarding the failure of defendant Scearce to conduct an investigation of the charges made against the plaintiffs prior to the commencement of the Civil Service Commission hearings; the failure of defendant Civil Service Commissioners Gould, Cummings, Essex and Marino, the Department of Personnel, the Civil Service Commission, and the City of St. Louis to require Scearce to make the investigation prior to the hearings, or to halt the hearings until he did so; the failure of defendant Comptroller Bass to make defendant Scearce file a complete audit, and to make an inquiry into why there was a change in plaintiffs' status; the claim that defendant Scearce allowed defendant Marino's name as being properly on the city payroll all stem from an alleged failure to follow procedures established by the Charter of the City of St. Louis and ordinances and regulations promulgated thereunder. Even assuming that these procedures were set up to afford protection to the plaintiffs as municipal employees, any so called rights derived therefrom arise by virtue of state (municipal) law.

As previously noted, rights created by state law are not properly the subject of a claim brought pursuant to 42 U.S.C. §1983, unless the violation of those rights also infringes upon some federally protected rights. It is the opinion of the Court that the alleged violations of any rights that might arise exclusively by virtue of the procedures provided by city charter, ordinances and regulations thereunder for failure to comply with said procedures do not rise to the level of a federal Constitutional violation. Due process for employees in the position pleaded by plaintiffs, as already noted, requires only notice and

a hearing before an impartial body or person; it does not require strict adherence to the City's statutory scheme as argued by plaintiffs. The Court, therefore, finds that plaintiffs are not seeking redress for any federally protected right as regards Counts II, III, IV, VII and VIII, and that these counts therefore fail to state a claim pursuant to 42 U.S.C. §1983. Accordingly, Counts II, III, IV, VI, VII and VIII will be dismissed as to all defendants therein named.

Additionally, it is the opinion of the Court that several counts of plaintiffs' second amended complaint must be dismissed as being barred by the statute of limitations, or for failure to state a claim on grounds other than those just discussed.

Because 42 U.S.C. §1983 does not contain its own period of limitation, the Court must apply the most appropriate limitations period provided by state law. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The choice of which statute to apply "ultimately rests upon a determination of which statute will best effectuate the congressional policies underlying the federal claims." *Green v. Ten Eyck*, 572 F.2d 1233, 1239 (8th Cir. 1978).

As the Court set out earlier in this Memorandum, the underlying claim is that plaintiffs were denied a fair hearing before an impartial body by virtue of the alleged bribe between defendants Wochner and Marino. Plaintiffs also charge in various counts that this was possible because other public officials, the Civil Service Commission, the Department of Personnel, and the City of St. Louis discharged their duties in an unlawful manner, or unlawfully failed to discharge their duties. Additionally, it is charged that this failure to strictly adhere to the procedures established by city charter, ordinances and regulations was a custom and policy of the City of St. Louis.

It is the opinion of the Court that the Missouri statute of limitations which deals expressly with actions against a public officer for a "liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty . . ." is the statute that would best effectuate the congressional policies underlying plaintiffs' claim. Mo. Rev. Stat. (1969) §516.130(1). In accordance with decisions previously rendered in this district and circuit, the Court finds that this three year statute of limitations is most directly applicable to the issues at bar. See *Green v. Ten Eyck, supra; Peterson v. Fink,* 515 F.2d 815 (8th Cir. 1975); and *Tyler v. Ryan,* 419 F.Supp. 905 (E.D.Mo. 1976). Accordingly, the three year period set forth in Mo. Rev. Stat. §516.130(1) will be controlling.

Plaintiffs allege in Count I of their second amended complaint that defendant Wochner lodged false, malicious, and frivolous charges against the plaintiffs on June 25, 1973. Plaintiffs further claim that defendant Mayor Poelker knew of Wochner's acts and did not intercede to prevent his "constitutionally deprivacious" conduct.

Because the claim asserted in Count I of the second amended complaint arose out of the occurrence set forth in the original complaint filed on March 22, 1977, this new claim relates back to the date of filing of the original complaint as it concerns defendant Wochner. Fed.R.Civ.P. 15(c). Because the essence of Count I is a challege to the truthfulness of the charges levied against plaintiffs, the three year statute of limitations began to run as of the date those charges were filed. Therefore, even after adopting March 22, 1977, as the appropriate tolling date, this challenge to the charges brought against plaintiffs was filed more than three years after the cause of action arose. Accordingly, plaintiffs' complaint against defendant Wochner on this claim is barred.

Plaintiffs' allegations that defendant Poelker should have interceded to halt defendant Wochner's actions are likewise barred. Count I is merely a new claim asserted by plaintiffs. Assuming that Mayor Poelker could have interceded at any time after the charges were leveled, the limitations period began to run after June 25, 1973. Accordingly, this suit having been filed on October 17, 1978, it is clear that this action against Mayor Poelker was not timely filed.

Count II of plaintiffs' second amended complaint contains allegations that defendant Scearce, the Director of Personnel, failed to investigate the charges brought against the plaintiffs prior to the Civil Service Commission hearings, as purportedly required by Civil Service Rules. Plaintiffs claim that if Scearce had investigated, he would have found the charges false. Plaintiffs would have thus been continued on salary, and the burden of the appeal would have fallen on defendant Wochner. Construing the allegations in a manner most favorable to plaintiffs, this Court assumes without deciding that defendant Scearce could have conducted the investigation as at any time prior to the rendering of the Civil Service Commission decision on October 14, 1975. The three year period of limitations, therefore, had run by the time this action was first filed against defendant Scearce on October 17, 1978.

The plaintiffs further allege that the failure of defendant Scearce to conduct this investigation was known by all defendants named in this complaint; that Scearce had on "numerous similiar occasions" failed or refused to make obligatory investigations. Plaintiffs go on to claim that Scearce's approach to his duty was arbitrary and capricious, and that he was selective in the application of Civil Service Rules. Plaintiffs further allege that this approach to Scearce's position was considered "usage, custom and policy of the City of St. Louis by and through the Department of Personnel, its agents and employees and the Civil Service Commission, its agents and employees."

For this allegation, plaintiffs seek special, actual, and punitive damages against the Department of Personnel, the Civil Service Commission, and the City of St. Louis.

It is the opinion of the Court that Count II cannot state a cause of action against the Department of Personnel because the Department is not a proper party defendant. The Department of Personnel is an integral part of the City of St. Louis government, and is merely the administrative arm whereby employment functions are performed. The Department of Personnel lacks a legal identity apart from that of the City of St. Louis, and as such is not a suable entity. See *Simon v. St. Louis County Police Department*, 14 FEP 1363 (E.D.Mo. 1977). Count II will therefore be dismissed as to the Department of Personnel.

The allegation that the other defendants had knowledge of and tacitly agreed to Scearce's alleged failure to perform an investigation prior to the commencement of hearings by the Civil Service Commission on October 5, 1973, must also fail as to all defendants except the City of St. Louis for not being brought within the three year statute of limitations. The Civil Service Commission was first brought into this action in the second amended complaint filed on October 17, 1978, a period of greater than three years. However, the City was first named as a defendant, though subsequently dismissed out, in the first amended complaint filed June 9, 1978. The time of filing this charge against the City thus may properly relate back to that June date, so that the action was commenced within a period of three years. Accordingly, Count II must be dismissed as to the Civil Service Commision, but will not be dismissed on these grounds against the City of St. Louis.

Count III of plaintiffs' second amended complaint alleges that Civil Service Commissioners Gould and Cummings began the appeals hearing before receiving, and without requiring,

defendant Scearce's investigation of the charges brought against the plaintiffs. Said hearings having begun on October 5, 1973, and this complaint having been filed on October 17, 1978, it is clear that the three year statute of limitations has run. Count III will therefore be dismissed as to defendants Gould and Cummings.

Count IV seeks damages from Civil Service Commissioners Essex and Marino for not halting the Civil Service Commission hearings for lack of Scearce's investigation. Count IV also contains allegations that Essex and Marino are liable because they knew of the negligent failure of defendants Gould and Cummings to require Scearce to make his investigation.

Assuming that this charge would state a cause of action against defendant Essex, the claim would be barred by the statute of limitations. At the latest, the statute began running on October 14, 1975, the date of the Civil Service Commission decision. Suit having been filed against defendant Essex on October 17, 1978, the action was filed after a period of greater than three years, and thus is barred. The three year statute of limitations, however, has not run as to defendant Marino because of the relation-back provision of Fed.R.Civ.P. 15(c).

Count VI alleges that defendant Bass, as Comptroller of the City of St. Louis, failed to make defendant Scearce file a complete audit or to make any reasonable inquiry into why there was a change in plaintiffs' status. Plaintiffs plead that the date of Bass's alleged negligent acts are August 1, 1973, as to plaintiff Robinson, and January 1, 1974, as to plaintiff Gore. Comptroller Bass having first been named as a defendant in plaintiffs' lawsuit on October 17, 1978, this claim is barred by the three year statute of limitations.

Plaintiffs' claims in Counts VII and VIII allege that defendant Scearce allowed defendant Marino's name to be placed on the payroll certification, and that defendants Bass and Percich as Comptrollers did not verify Marino's name as being properly on the payroll. Defendant Marino is alleged by plaintiffs to have accepted his position with defendant Wochner on October 20, 1975. Accordingly, this claim was filed against defendants Scearce, Bass, and Percich, within the three year limitations, period and thus is not barred on these grounds.

Count IX charges that defendant Mayors Poelker and Conway failed to require appointees to post a bond as required by §73.470 R.S.Mo. 1969. Because this section of the Missouri statutes was repealed in 1975, and Mayor Conway assumed office in 1977, a cause of action cannot be said to exist as to Mayor Conway. Nor can a cause of action be said to exist as to Mayor Poelker for failure to require a bond from any officer elected or appointed after 1975. This would include Comptroller Percich.

Furthermore, the Court believes that §73.470 is not applicable to constitutional charter cities such as the City of St. Louis. See *Leoffler v. Kansas City, Mo.*, 485 S.W.2d 633 (Mo.App. 1972). Plaintiffs have therefore failed to state a cause of action and Count IX will be dismissed.

In Count X, plaintiffs seek injunctive and monetary relief for their claim that all of the named defendants have refused, and continue to refuse, to "correct, rectify, or change" the administration of charter and ordinance provisions cited in the aforementioned counts, and that the refusal has been the custom and policy of the City of St. Louis. By virtue of the previously enumerated actions taken, or which should have been taken, by the several public officials, plaintiffs claim that they were denied a

> legal, objective, and unbiased forum in which to adjudicate their innocence of the serious charges as leveled by Dr. Wochner, and have been directly damaged by the failure of the aforementioned office holder (sic) to fulfill their Charter and Ordinance duties and obligations of their respective offices as previously plead; all of which inure to the detriment of the plaintiffis' (sic) due to the activities complained of since June 1973 when the unsubstantiated charges were preferred by Dr. Wochner.

As previously discussed, the alleged actions and inactions of the individual defendants in failing to strictly adhere to the procedures established to deal with discharged employees do not rise to the level of a constitutional violation. Count X must therefore fail for not stating a cause of action for denial of due process of law.

Additionally, because defendants are alleged to have acquiesced in and affirmed this policy by virtue of taking those actions, or failing to act, in the manner pleaded in the preceding counts, the Court must look to when those actions occurred in light of the applicable statute of limitations. Plaintiffs have set forth no additional acts by the defendants in Count X, so that the previous discussion by the Court regarding the running of the statute of limitations is applicable to each of the defendants named in this final count. Count X must therefore be dismissed as to defendants Gould, Essex, Cummings, Poelker, the Department of Personnel and the Civil Service Commission as being time-barred.

Furthermore, there being no additional acts alleged, beyond those pleaded in Counts II and IX, Count X must be dismissed as to the Department of Personnel and Mayors Conway and Poelker for failure to state a cause of action for the reasons heretofore stated.

In considering whether Count X states a cause of action as to the City of St. Louis, the Court must look to *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), wherein the Supreme Court held that a municipality is a person within the meaning of 42 U.S.C. §1983. While the Court expressly disclaimed the doctrine of respondeat superior as a theory of liability under this section, the Court did hold that a city itself could be liable where the conduct of the city executes or implements official policy. Such policy might be found in an ordinance, regulation, policy statement or decision officially adopted by the city's officers, or it could be found in a pattern of "persistent practices" sufficiently known to and approved by city officials to constitute a custom of "equivalent though unofficial authoritativeness." *Smith v. Ambrogio*, 456 F.Supp. 1130 (D.Conn. 1978). See also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970).

To state a cause of action against a municipality under 42 U.S.C. §1983, there must be alleged conduct by the city that subjects a person to a denial of a constitutional right or causes him to be subjected to such a denial. *Smith v. Ambrogio*, supra at 1134. Because the acts of the defendants, with the exception of the allegations contained in Count V against defendants Wochner and Marino, do not rise to the level of a constitutional violation, charging the City of St. Louis with legal responsibility for such conduct fails to state a cause of action. The City of St. Louis also cannot be held legally responsible for the alleged conduct of defendant Wochner in bribing defendant Marino, because the imposition of liability here would be by a theory of respondeat superior. *Monell, supra.* Therefore, Count X must be dismissed as to the City of St. Louis.

For the reasons heretofore enumerated, Counts I, II, III, IV, VII, VIII, IX and X will be dismissed as to all defendants.

Dated this 29th day of June, 1979.

Edward L. Filippine /ss/
UNITED STATES DISTRICT JUDGE

(Appendix C)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-305 C (4)

STATE OF MISSOURI, ex rel.,
MINNIE E. T. GORE, and
JENNYE ROBINSON,
Plaintiffs,
v.
R. DEAN WOCHNER, M.D., et al.,
Defendants

ORDER

This matter is before the Court on plaintiffs' motion for reconsideration of the Court's order and judgment of dismissal as to certain counts of plaintiffs' petition.

After consideration of the matter,
IT IS HEREBY ORDERED that the motion be and is DENIED.

Dated this 9th day of August, 1979.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

(Appendix D)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-305 C (4)

STATE OF MISSOURI ,ex rel.,
MINNIE E. T. GORE, and
JENNYE ROBINSON
Plaintiffs,

v.

R. DEAN WOCHNER, M.O., et al.,
Defendants.

ORDER OF THE DISTRICT COURT

The Court hereby order and adjudges that it's order dismissing Fred Gould, David V. Essex, Jr., John Poelker, John Bass, R. Elliott Scearce, James Conway, Raymond Percich, William Duffee, R. Cummings, City of St. Louis, The Civil Service Commission, The Department of Personnel is hereby adjudicated and decreed to be a final judgment as between the plaintiff's and the above-named defendant's. Further ,this Honorable Court finds that their is no just reason for delay. This order of final judgment is entered to permit the named plaintiff's to perfect their appeal as provided by Rule 54(B) F.R.C.P.

Date: Aug. 28, 1979

Edward L. Filippine
U.S. District Judge

(Appendix E)

STATE OF MISSOURI
COUNTY OF ST. LOUIS

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-305-C(3)

STATE OF MISSOURI, ex rel.,
MINNIE E. T. GORE, and
JENNYE ROBINSON,

Plaintiff,

vs.

R. DEAN WOCHNER, M.D., et al.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that MINNIE E. T. GORE and JENNYE ROBINSON, Plaintiffs above named, hereby appeals to the U.S. Court of Appeals for the Eight Circuit from the Trial Court granting Defendant's motion to dismiss as to Counts I, II, III, IV, VI, VII, VIII, IX, X and all Defendants therein named entered June 29, 1979 and made a final judgment pursuant to Rule 54(b) F.R.C.P. on August 28, 1979 dismissing the above-enumerated counts of Plaintiffs second amended petition.

September 4, 1979

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(Appendix F)

UNTED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1759

State of Missouri ex rel,
Minnie E. T. Gore, et al,
Appellants,

vs.

R. Dean Wochner, M. D., et al,
Appellees.

Appeal from the United States District Court for the
Eastern District of Missouri.

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.
May 8, 1980

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Cause No. 77-0305-C (4)

STATE OF MISSOURI ex rel.
MINNIE E. T. GORE, JENNYE ROBINSON,
Petitioners,

vs.

R. DEAN WOCHNER, M.D. et al.,
Respondent.

SECOND AMENDED PETITION

COUNT I

COMES NOW the plaintiffs and for their cause of action against the defendants state as follows: to-wit:

1. Jurisdiction of this Court is founded upon Titles 42 U.S.C. 1983 and 28 U.S.C. 1343. Defendants herein and each of them jointly and severally at all times hereinafter mentioned, acting under color of state law and of the Charter of the City of St. Louis, State of Missouri, and duly enacted ordinances thereof, at all times mentioned in full force and effect, subjected plaintiffs to deprivation of their rights, privileges, and immunities, and, particularly, to their right to due process of law secured by the 14th Amendment of the United States Constitution; as hereinafter more particularly detailed.

2. Plaintiffs Minnie E. T. Gore and Jennys Robinson are residents of the State of Missouri, and reside in the jurisdiction of this District.

3. This cause is brought in the name of the State of Missouri, by the relation of plaintiffs, due to allegations contained in Count IX of the petition against defendants, and is mandatory as to allegations contained in said Count.

4. Defendant Wochner, is a resident of the County of St. Louis, Missouri and was at all timed mentioned employed by the City of St. Louis, as Director of Health and Hospitals, and Acting Hospital Commissioner, and is sued here both individually and in the capacities as heretofore mentioned.

5. Defendant John Poelker is a resident of the City of St. Louis, Missouri, and is sued here both individually and as the former elected Mayor of the City of St. Louis, a charter city under the laws of the State of Missouri; that he did during the times hereafter set forth have the authority, right and capacity to continue employment or terminate defendant, R. Dean Wochner, at his pleasure.

6. Plaintiffs were employees in the Civil Service of said City and prior to their dismissal employed in the following positions: plaintiff Gore as Director of the Municipal School of Nursing, plaintiff Robinson was a staff teaching nurse of the said School.

7. Prior to the defendants wrongful acts hereafter mentioned and while the plaintiffs engaged in their lawful professions, defendant Wochner, as appointing authority, lodged against plaintiffs charges of misconduct, impropriety, and incompetance and as a result thereof dismissed plaintiffs on June 25, 1973, from their positions.

8. That charges lodged against the plaintiffs by the defendant Wochner were done under color of the law; that defendant Wochner, was designated by the Charter of the City of St. Louis and ordinances thereof, as the appointing authority of

said plaintiffs, and had authority to terminate them for cause; that all of the charges then made against plaintiffs and each of them were untrue and false; that acts of defendant Wochner in dismissing plaintiffs breached his duty to plaintiffs of fairness, impartiality and consistency of administration of his duties as the appointing authority, and deprived them of equal protection of the law under the Constitution of the United States of America.

9. That a letter by defendant Wochner to plaintiff Robinson dismissing her for enumerated reasons and dated June 26, 1973, contained a statement that she could file a notice of appeal to the Civil Service Commission of the City of St. Louis, State of Missouri within ten (10) days. The charges as presented to plaintiff Robinson are as follows:

1. Materially misstated academic qualifications on application for employment and to the Director of the Department of Health and Hospitals.
2. That you failed to perform assigned work duties, you were absent from work assignments, necessitating performance of these duties by other employees. This was done at increased cost to the City.
3. You applied for and accepted overtime compensation without documentation and without having worked those hours.
4. That you took excessive and unreasonable sick leave without approval of your appointing authority.
5. That you failed to supervise through your absence the student nurses who were on clinical rotation to the patient management and emergency and disaster courses.
6. You applied for and accepted double compensation.
   (a) Specifically, you were paid a standard 80 hour, bi-weekly compensation and overtime compensa-

tion without having performed overtime responsibilities.

(b) Specifically, you were employed as an emergency graduate nurse at St. Louis City Hospital and as a Nurse Instructor II at the St. Louis Municipal School of Nursing. You were paid by both agencies for the same periods of time.

7. You failed to comply with the directives and regulations of the St. Louis Municipal School of Nursing.

8. Allowed your academic transcript from the Homer G. Phillips School of Nursing to be altered and you used this altered document to your personal advantage.

10. Prior to said letter, plaintiff Robinson did file with the Civil Service Commission a timely notice of appeal on June 25, 1973.

11. Plaintiff Gore was verbally notified by defendant Wochner she was dismissed June 25, 1973, but said charges and the specifications of her dismissal were not lodged with the Civil Service Commission until October 3, 1973, two (2) calendar days prior to commencement of hearings of her discharge, by the Civil Service Commission. Despite the time variance of the charge against plaintiff Gore, the Civil Service Hearings that commenced October 5, 1973, heard the charges as filed against plaintiff Gore by the defendant Wochner which are as follows:

1. You permitted Jennye M. Robinson to fail to perform her assigned duties as Instructor in the School of Nursing while she was a fulltime employee of the City of St. Louis.

2. You altered the Sign-In/Sign-Out Sheets to list additional time for Miss Robinson.

3. You approved overtime for Miss Robinson without documentation that this overtime duty was performed.

4. You caused to be altered the Homer G. Phillips School of Nursing student final record of Jennye Robinson and signed the same as her record and placed it in her official files.

5. You caused the record described to be forwarded to St. Louis University as the official student final record of Jennye M. Robinson.

6. You approved sick leave for Miss Robinson in excess of your authority.

7. You misrepresented the facts and attempted to conceal these matters from me in my investigation.

12. That at all times herein mentioned, the acts of the appointing authority, R. Dean Wochner, were conducted under color of state law and the authority of the Charter of the City of St. Louis, and ordinances thereof, and the said acts were, capricious, spiteful, and malicious as to each plaintiff and constituted a deprivation of plaintiffs' rights, privileges and immunities and right to due process; that the defendant Poelker knew or in the exercise of ordinary care should have known of the acts; he condoned the acts of defendant Wochner and refused to intercede to prevent the constitutionally deprivacious conduct by defendant Wochner.

13. That all of the aforesaid acts by defendant Wochner as set forth relating to plaintiffs Robinson and Gore, were known to defendant or should have been known to defendant to be untrue, false, malicious, and done solely to injure and harm plaintiffs and each of them; that said acts were ratified and approved by the acts of omission of defendant Poelker, who permitted the same to exist while having the absolute authority to terminate their continuation.

14. That the charges of complaint lodged against plaintiffs by defendant Wochner, as set forth above, are frivolous and untrue; that they were preferred against plaintiffs by Wochner

without probable cause or legal foundation; that some of the complained of acts did in any event pre-date in time the assumption of duties by the defendant Wochner of his positions as the appointing authority, and also the election of the defendant Poelker by whose grace the defendant Wochner continued in his capacity as the appointing authority.

15. That as a direct and proximate result of said acts of Wochner and Poelker, and each of them jointly and severally, plaintiffs suffered shame, humiliation, and embarrassment due to their loss of professional reputation and standing in their profession and community at large, and as a further result of said acts they, plaintiffs and each of them suffered great mental anguish that additionally plaintiff Robinson suffered loss of salary and income justly due her from June 26, 1973 to October 5, 1973 in the sum of Three Thousand Five Hundred ($3,500.00) Dollars.

WHEREFORE, plaintiffs pray for judgment against the defendants Wochner and Poelker and each of them jointly and severally for actual damages in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars actual damages, and plaintiff Robinson prays in addition for her special damages of lost income in the sum of Three Thousand Five Hundred ($3,500.00) Dollars, and each plaintiff prays judgment against the aforementioned defendants jointly and severally in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars punitive damages; further, that plaintiffs and their attorney be awarded a reasonable sum of money to adequately compensate them for the cost, time and, expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award act, 42 U.S.C. 1988.

COUNT II

COMES NOW the plaintiffs and for their cause of action in Count II hereof state and over as follows:

1. Plaintiffs incorporate herein as plead paragraphs one through fifteen of Count I.

2. Said defendant Scearce is sued here individually and in his official capacity as hereafter more fully set forth and described.

3. Defendant, R. Elliott Scearce, is a resident within the jurisdiction of this court and was employed as the Director of the Department of Personnel of the City of St. Louis, State of Missouri, a municipal agency within the corporate structure of the defendant City of St. Louis.

4. That as Director, the defendant Scearce was responsible for the administration of the Civil Service Commission of the City of St. Louis, and was the Secretary of the Civil Service Commission as prescribed by Article XVIII Section 9(a) of the Charter of the City of St. Louis.

5. That the Civil Service Commission of the defendant City of St. Louis, is a commission and agency of said city by virtue of the charter provision of said defendant City. The commission itself is composed of three members appointed by the Mayor who thereafter serve a staggered term or until their successors are appointed. The commission members themselves serve as part-time overseers of the Department of Personnel which, is charged by charter with the administration of the Civil Service system. The system is responsible for the employment of some eighty-five (85%) percent of all municipal employees under a merit system. The commission is

charged with monitoring and adjudicating the complaints of employees working under said system, whereas the Director of Personnel, defendant Scearce, is by charter the administrator of said system. The Director of Personnel is by charter the Secretary of the Commission, carrying out and implementing the mandates and directions of the Commission within their area of charged responsibility.

6. There was at all times here mentioned in full force and effect the following provisions of the Charter of the City of St. Louis, to-wit:

> "Removals and demotions. – For removals, demotions and decreases in pay in the case of employees whose service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employees affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness." Article XVIII, Section 2(n)

7. That pursuant the powers and duties of the Director of Personnel set forth in Article XVIII, Section 7(b); defendant Scearce had, prior to the time here in at issue, recommended and said Commission had adopted, certain rules and regulations known as the Civil Service Rules which were necessary to implement the authority in Article XVIII, Section 2(n), supra. Further, the Civil Service Commission had adopted as one of the rules, the following, to-wit:

Rule IX Sec. 4 "(d) Dismissal, reduction in pay, demotions:

> Any dismissal, demotion, or reduction in pay shall be reported to the Director in writing and copy of such notice shall be given to the employee and shall include notice of his right of appeal and the reasons for the action. The Director shall, within a reasonable time, in every such case, investigate the circumstances surrounding the action

to insure that it is being taken on the sole grounds of merit and fitness, and shall indicate his approval or disapproval in writing to the appointing authority to the employee. In case the action is approved, it shall become immediately effective, but the employee shall retain the right to appeal to the Commission. In case the action is disapproved, the employee shall be continued in the same status in the position, but the appointing authority shall retain the right of appeal to the Commission. Such appeals from the decision of the Director shall be taken in accordance with Rule XIII."

8. Plaintiffs state they timely notified the said Commission and defendant Scearce of their appeal from the actions of defendant Wochner.

9. That defendant Wochner in his attempts to dismiss plaintiff Gore was without authority. Article XVIII, Section 7 states, in part, as follows:

Section 7. Commission power and duties. – The Commission shall have power, and it shall be its duty:

(a) Administration – To prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith.

(b) Ordinances. – To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:

.... (2) a plan for a system for retirement of superannuated and otherwise incapacitated employees, if and when permissible under the constitution and laws of the State of Missouri;"

10. Plaintiff Gore states upon her information and belief that there has never been enacted any legal or ordinance authority complementing the above cited Charter prescription; yet, despite the lack of authority, the Civil Service Rules state, inter alia,

"Rule IX – Separations and Disciplinary Action"

Section c. DISCIPLINARY ACTION:

Employees in the classified service may be removed, demoted, reduced in pay, fined, or suspended without pay for just cause.

(a) Reasons for disciplinary action; appointing authority to take such action:

When any employee in the classified service is unable or unwilling to perform the duties of his position in a satisfactory manner, or has committed any act or acts to the prejudice of the service, or has omitted to perform any act or acts it was his duty to perform, or who has ceased to reside in St. Louis, or whose service rendered is below satisfactory standards or otherwise has become subject to disciplinary or other corrective measures, the appointing authority shall have the power and its shall be his duty to take action in one of the following ways:

.... (6) To dismiss the employee from the City Service.

(7) To retire the employee under the terms of any retirement act for City employees in existence at the time or removal and under which the employee is entitled to benefits.

11. That, the appointing authority did not have the power to order the retirement of plaintinff Gore, and, the Civil Service Commission could not thereafter uphold such an order; that, in either event, the defendant Scearce was negligent in the conduct of his office in that he failed to follow the mandatory prescription of Article XVIII Section 2 (n) and the Civil Service Rule IX Section 4(d), supra, and plaintiffs here state

that said defendant Scearce made no investigation before the termination of either the facts of said charges as to plaintiff Robinson and as to plaintiff Gore; further, that such acts were wilfully and maliciously negligent or in conscious disregard of the rights of both plaintiffs.

12. That, as a direct and proximate cause of the negligent acts of defendant Scearce in his failure to perform his duties, imposed by Charter and Rule for the protection of a class of people to which plaintiffs belong by reason of the acts of defendants Wochner and Poelker as set forth above; the plaintiffs, and each of them, suffered as a result thereof a loss of salary during the entire period of their appeal caused by the capricious acts of defendant Wochner in terminating them.

13. As a matter of policy and custom, the defendant Scearce did on numerous similar occasions, fail or refuse to make obligatory investigations as required by Civil Service Rules, that said defendant when he did investigate, did so selectively; but that said act of the defendant Scearce in failing and neglecting his duty, save and except as was his whim and caprice, was in fact an approach to his position that was arbitrary, capricious, and selective in the application of said laws, further, over a course of time it was considered usage, custom, and policy of the City of St. Louis by and through the Department of Personnel, its agents and employees and the Civil Service Commission, its agents and employees. Further, it was considered the same by all parties herein named as defendants; and, that irrespective of any other act of commission or omission, there was to all named defendants before this court a knowledge, agreement, the approval of the above acts which were carried on in complete deprivation and total disregard to the rights of plaintiffs, both individually and as members of a class of people who were subject to disciplinary action by any appointing authority of said City. Further, said

deprivation impaired the rights, priviliges and immunities of the plaintiffs which are secured and guaranteed under the Constitution of the United States of America.

14. That all parties, individually and in their official capacities while holding a position within the scheme of the Civil Service framework of the City of St. Louis or the Department of Personnel whether named herein as defendant or not, were aware of and had knowledge of the arbitrary, capricious, and whimsical manner in which said defendant Scearce selectively carried out his prescribed duties. Further, further, with the knowledge and the tacit agreement of said parties, there developed an administration which established the manner of application of laws of the Department of Personnel of the City of St. Louis as they dealt with the Civil Service, established by the Charter of the Charter of the City of St. Louis and ripened into defendant City's usage, custom, action, and policy.

15. That, had defendant Scearce discharged his duty, the plaintiffs would have, during the protracted hearings before the Civil Service Commission, been paid full salary; and that, additionally as provided by said rule, the appeal would have fallen on defendant Wochner: the effect of which would have greatly reduced and diminished the shame, embarrassment, and humiliation suffered by plaintiffs' and would have removed the sting of disfavor and rejection suffered by plaintiffs, both professionally and in society as a whole, which resulted when the aforementioned acts of defendant Wochner were visited on plaintiffs.

WHEREFORE, plaintiff Robinson prays special damages against the defendant Scearce, City of St. Louis, Department of Personnel, and the Civil Service Commission, jointly and severally, for her lost wages in the sum of Thirty Five Thou-

sand ($35,000.00) Dollars, from August 1, 1973 to October 20, 1975; for actual damages for her humiliation and disgrace professionally and personally, and her mental anguish, in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, and punitive damages in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars; plaintiff Gore prays special damages against the aforementioned defendants jointly and severally in the sum of Forty Thousand ($40,000.00) Dollars lost wages from January 1, 1974 to October 20, 1975, and actual damages for her humiliation and disgrace and mental anguish in the sum of Two Hundred Fifty Thousand ($250,-000.00) Dollars, punitive damages in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars; further, that plaintiffs and their attorneys be awarded a reasonable sum of money to adequately compensate them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

COUNT III

COMES NOW the plaintiffs and for Count III of their petition states as follows, to-wit:

1. Plaintiffs hereby incorporate, as plead, paragraph one through fifteen of Count II.

2. Defendant Fred Gould, a resident of the State of Missouri, is within the Court's jurisdiction and is here sued both individually and in his official capacity as a member of the Civil Service Commission of the City of St. Louis.

3. Defendant Cummings, a resident of the State of Missouri, is within the Court's jurisdiction and is here sued both individually and in his official capacity as a member of the Civil Service Commission of the City of St. Louis.

4. At the time of plaintiffs' verbal notice of dismissal on June 25, 1973; the Civil Service Commission was then composed of defendant's Cummings, Gould, and George Stemmler, now deceased.

5. That on or about October 5, 1973 said commission members were present and acting both individually and in their capacity as members of the said Commission. Further, they were charged with the knowledge of rules of procedure, and had, as a condition of the commencement of said hearings, a duty to insure that the Secretary of the Commission, as the Director of Personnel, had discharged his duty of inquiry as set forth above; but that each of the said members failed or refused to discharge his obligations and commenced the said hearing without requiring that provisions of both the City Charter and Civil Service Rules be adhered to as a condition precedent of said hearings.

6. That their individual breach of this duty was clear; since, in fact, the conclusions of the Director of Personnel as to his investigation as set forth above in Rule IX, Section 4(d) was required to have been in writing and thus was necessarily a part of the personnel file of plaintiffs herein: and that the said defendants negligently and carelessly failed to pursue said an inquiry to determine if compliance with the Civil Service Rules as it pertained to defendant Scearce duties, was satisfied. That said acts of the herein named defendants were wilfully and intentionally done or were done with a conscious disregard for the rights of plaintiffs.

7. That the failure of the defendants, and each of them, constituted a fundamental breach of their duties to each of the plaintiffs in that the prescription of the Charter, as reinforced by the Civil Service Rules, was enacted to guard against the very arbitrary, capricious, and selective conduct herein

complained of. Further, that the plaintiffs, individually, had a right to rely upon the said defendant Commissioners, and each of them jointly and severally, at every state of the proceedings in which plaintiffs had been cast as members of the class of people for whom the Charter provisions of the Civil Service Rules had been adopted to protect. Further, they relied that the various duties and functions of the office which defendants, both individually and in their official capacities, would be exercised and discharged according to their sworn duty; but that the said defendants, and each of them, totally disregarded their responsibilities to said class of people.

8. That said acts or omissions to act deprived the plaintiffs, both individually and as members of the class of persons under the aforecited Charter and Rules in which they were cast, of their rights, privileges, and immunities secured and guaranteed by the United States Constitution under color of state law.

WHERETOFORE, plaintiff Robinson prays special damages against the defendants Gould and Cummings jointly and severally for her lost wages in the sum of Thirty Five Thousand ($35,000.00) Dollars, from August 1, 1973 to October 20, 1975; for actual damages for her humiliation and disgrace professionally and personally in the hum of Two Hundred Fifty Thousand ($250,000.00) Dollars, and punitive damages in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars; plaintiff Gore prays special damages against the aforementioned defendant jointly and severally in the sum of Forty Thousand ($40,000.00) Dollars lost wages from January 1, 1974 to October 20, 1975, and actual damages for her humiliation and disgrace in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, punitive damages in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars; further, that plaintiffs and their attorney be awarded a reasonable sum of money to adequately compensate them for the

cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

COUNT IV

COMES NOW the plaintiffs and for Count IV of their petition state as follows, to-wit:

1. Plaintiffs hereby incorporate herein as plead paragraphs one through eight of Count III of said petition.

2. That shortly after the commencement of the Civil Service Commission hearings on or about October 5, 1973, wherein said Commission began hearing the appeals of plaintiffs Gore and Robinson; there was affected certain changes in the composition of said Civil Service Commission the effect of which was to remove as a Commissioner, and, therefore, as Hearing Judge of said Commission, members Cummings and Stemmler. They were replaced on the Commission by defendants Marino and Essex.

3. Defendant Marino is a resident of the State of Missouri and resides within the jurisdiction of this court, and is sued here both individually and in his official capacity as a member of the Civil Service Commission of the City of St. Louis.

4. Defendant Essex is a resident of the State of Missouri and resides within the jurisdiction of this court, and is sued here both individually and in official capacity as a member of the Civil Service Commission of the City of St. Louis.

5. That upon each of the above named defendants assuming their duties as members of the Civil Service Commission, they represented and stated that they had read and familiar-

ized themselves with the prior proceedings then in progress and were aware and informed of the charges and specifications against the plaintiffs. Further, that they were familiar with the Charter requirements of the City of St. Louis, the ordinances enacted pursuant thereto, and had knowledge of the rules and procedures of the Civil Service Commission of the City of St. Louis then in force and effect.

6. That by said statements and assertions the above named defendants admitted that they had actual or constructive knowledge of the negligent failure of defendant Scearce in the fulfillment of his duty as herein plead. Further, said defendants admitted that they had actual or constructive knowledge of the negligent failure of defendants Gould and Cummings in the fulfillment of their duty as herein plead. The above named parties in their failure to demand a cessation of the hearings then in progress until defendant Scearce had performed his duty were negligent and in direct violation of their sworn duty prescribed and defined as follows:

> "Section 7. Commission powers and duties.—The commission shall have power, and it shall be its duty:
>
> (a) Administration. — To prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted pursuance thereof, and not inconsistent therewith. *Article XVIII, Section 7(a) the Charter of the City of St. Louis.*
>
> "Section 1. APPEALS:
>
> The Commission shall have power, and it shall be its duty to consider and determine any matter involved in the administration and enforcement of Article XVIII and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the Director, or on appeal by any appointing authority, employee, or

taxpayer of the City, from any act of the Director or of any appointing authority. The decision of the Commission in all such matters shall be final, subject, however, to any right of action under any law or the State or of the United States." *Section 1 Appeals, Hearings, & Investigations: Rule XIII Civil Service Rules.*

7. That said negligence was done under color of state law and was violative of plaintiffs' due process rights secured by the Constitution of the United States of America.

WHERETOFORE, plaintiff Robinson prays special damages against the defendants, Marino and Essex jointly and severally for her lost wages in the sum of Thirty-Five Thousand ($35,000.00) Dollars, from October 5, 1973 to October 20, 1975; for actual damages for her humiliation and disgrace professionally and personally in the sum of Two Hundred and Twenty Five Thousand ($225,000.00) Dollars, and punitive damages in the sum of Two Hundred and Twenty Five Thousand ($225,000.00) Dollars; plaintiff Gore prays special damages against the aforementioned defendants jointly and severally in the sum of Forty Thousand ($40,000.00) Dollars lost wages from January 1, 1974 to October 20, 1975, and actual damages for her humiliation and disgrace in the sum of Two Hundred and Twenty Five Thousand ($225,000.00) Dollars; further, that plaintiffs and their attorney be awarded a reasonable sum of money to adequately compensate them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

COUNT V

COMES NOW the plaintiffs and for Count V of their petition state and avers as follows, to-wit:

1. Plaintiffs hereby incorporate herein as plead paragraphs one through seven of Count IV of this petition.

2. That, as a result of the above, Civil Service Commission commenced hearing the appeals of plaintiffs on October 5, 1973 and that said hearings continued through 18 seperate sessions concluding June 25, 1975 and resulted in one thousand seven hundred and fifty (1,750) pages of transcribed testimony.

3. Many charges of misconduct, as stated above, placed against plaintiffs by defendant Wochner, were alleged to have occurred during the years 1967-1970, prior to defendant Wochner's assumption of office. The case was not finally submitted to the Commission until June, 1975.

4. That defendant Marino, since his appointment in December, 1973, as Chairman of the said Commission, assumed control of the hearings, ruled on admissibility of evidence, structured time frames for all proceedings, and was in fact the dominant member of the Commission exercising persuasive control over fellow members, stating in the course of the hearings that he, Marino, "speaks for" other members of the Commission although the other members of the Commission were present, heard such assertions and made no rejoinder denying the accuarcy of such assertions.

5. Defendant Marino had been dismissed from employment with Blue Cross in March, 1975, prior to the conclusion of the Commission hearing; and was thereafter without full-time em-

ployment and as a result his personal economic condition became desperate.

6. Prior to conclusion of the said Commission hearings, Marino, by his own admission, solicitated assistance of Robert Duffe, the executive administrative aide to defendant Poelker who was knowledgable in all aspects of municipal employment, to aid him in the securing of employment within the City of St. Louis, State of Missouri.

7. After the submission of the plaintiffs' case to the said Commission in June, 1975, pleas for employment were made by Marino to Robert Duffe which covered a period of approximately four (4) months. Finally, in August, Duffe advised Marino to contact defendant Wochner for employment, after discussing the matter with defendant Poelker, the then Mayor of defendant City of St. Louis.

8. In August or September, 1975 Marino contacted Wochner; a meeting was arranged which concerned the employment of Marino by defendant Wochner. Further discussions occurred over several weeks between said defendants culminating in defendant Wochner tendering defendant Marino a job on or before October 13, 1975. Defendant Wochner's purpose and intent in tendering an offer of a job to Marino, in exchange for his voting against and influencing the other members of the Commission in voting against plaintiffs, was to cure and make whole the then unsubstantiated charges lodged against plaintiffs by Wochner in the first instance. Due to the absence of any meaningful foundation in fact or evidenciary support for the charges lodged against plaintiffs by defendant Wochner, the bribery was used by defendant Wochner to correct the lack of probable cause in the charges as originally filed.

Then, on October 14, 1975, Marino as Chairman and controlling member of the said Commission, voted and ruled adversely and against the interest and rights of the plaintiffs and in favor of plaintiffs' accuser, defendant Wochner.

10. Less than seventy-two (72) hours after the announcement of the decision in favor of defendant Wochner and against plaintiffs:

A. Defendant Wochner forwarded to defendant Marino plaintiffs' exhibit "A" attached hereto and incorporated herein as if plead; and

B. Defendant Marino resigned his position as Chairman of the Civil Service Commission of said City, on October 17, 1975 and accepted the offer contained in plaintiffs' exhibit "A", commencing work under its terms on October 20, 1975.

11. Plaintiffs further state that the time of said offer by defendant Wochner and its acceptance by defendant Marino, there was no authority for said position within the table of organization of the Civil Service Commission of said City; it was not within the budget of the Department headed by defendant Wochner and, therefore, the acts of the defendants were unlawful, malicious, oppressive, and corrupt.

12. There was at all times during the above mentioned actions in full force and effect the following:

A. Article XVIII. Civil Service in the revised Code of the City of St. Louis which states:

> "h" 'Excepted position' means any position in the classified service not subject to the provisions of this article requiring competitive tests of fitness for appointment and such other provisions as, by their terms apply specifically

to competitive positions alone. All such positions, however, shall be subject to all other provisions of this article insofar as consistent with law and with this exception. The following described positions and not other shall be deemed to be excepted positions:

(1) all positions filled by election of the people;

(2) all positions of heads of principal departments and of independent agencies that are filled by appointment by the Mayor;

(3) one position of executive secretary and one position secretary and stenographer to the Mayor;

(4) all positions of paid members of boards;

(5) all officers and employees of the Board of Aldermen;"

B. Article XVIII, Section 3 of the Revised Code of St. Louis which states:

"(g) Temporary Appointments— for temporary appointments without competitive tests, to competitive positions, for not to exceed sixty days in any case, which shall not be renewed or extended. Such temporary appointments to be provided for shall include provisional appointments in the absence of available eligibles pending establishment of eligible registers and certification and appointment therefrom, transient appointments for short jobs of work, and emergency appointments pending filling of vacancies by other means than such emergency appointments."

C. Article XVIII, Section 18 of the Revised Code of St. Louis which states:

"Section 18. Promises of official influence to affect political action. – No person, while holding any City office, or while in nomination to appointment to any such office, shall corruptly use or promise to use, directly or indirectly, any official authority or influence, possessed or anticipated, to confer upon any person, or to secure or aid any

person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration or condition that the vote or political influence or action of any person shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration. No person, being an officer of the City, or having or claiming any such authority or influence, in relation to the nomination, employment, confirmation, promotion, removal or increase or decrease of salary, of any employee, shall corruptly use, or promise or threaten to use, any such authority, or influence, directly or indirectly to coerce or persuade the vote or political action of any person or the removal, discharge or promotion of any employee of the City."

D. Article XVIII, Section 22 of the Revised Code of the City of St. Louis, which states:

"Section 22. Violation of civil service provisions. – any person who shall willfully or through culpable negligence violate or conspire to violate any provision of this article or any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employee of any such offense shall operate automatically to terminate his service and to vacate his position. Any employee so removed from the service shall not be reinstated, re-employed, or re-appointed, or in any other manner, re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way affect any prosecution that may be elected to be initiated

under any other provision of law relating to nonfeasance, malfeasance or misfeasance of public officers."

13. Further, charter provisions and ordinances touching upon the activities of the defendants Wochner and Marino are included in ordinances, as follows:

A. Ordinance 52500 of the City of St. Louis which states:

"Section One. Every person who shall 1) directly or indirectly give, offer any money, goods, right in action or any other valuable consideration, gratuity or reward, or any promise, undertaking, or security therefor to any public officer of the City of St. Louis, Missouri, or any employee thereof with intent to influence his vote, opinion, judgment or decision on any question, matter, election, appointment, cause or proceeding which then may be pending, or may be law be brought before him in his official capacity or to induce him to neglect or omit performance of any official duty, or to perform such duty with partiality or favor, or otherwise than is required by law: . . . ."

B. Ordinance 52814 of the City of St. Louis, which states:

"An ordinance amending Chapter 41 of the Revised Code of the City of St. Louis by adding two new sections defining the duties of officers and employees of the City and providing a penalty for the violation thereof.

Be it ordained by the City of St. Louis as follows:

Section One. Chapter 41 of the Revised Code of the City of St. Louis is hereby amended by adding two new sections thereto, to be known as Section 41.040 and Section 41.050, which shall read as follows:

Section 41.040. Additional Duties Officers and Employees. The official duties of officers and employees of the City shall be performed for the benefit of the public only and shall be discharged faithfull regardless of personal con-

siderations. No officer or employee shall, for private gain, grant any special treatment or advantage to any person. Nor shall any officer solicit or accept any payment or gift of money or any other thing of value for any service performed in his official capacity nor for the doing of any act which he is required by law to do.

Section 41.050. Penalties and Enforcement. Any wilful violation of any of the provisions of this ordinance shall constitute cause for a fine of not more than five hundred dollars ($500.00); suspension or removal from office or employment, or other disciplinary action."

14. There was at all times during the above actions in full force and effect the following enacted revised statutes of the State of Missouri:

A. "Section 558.010 Bribery of Public officials — penalty

Every person who shall, directly or indirectly, give any money, goods, right in action or any other valuable consideration, gratuity or reward, or any promise, undertaking or security therefor, to any judge or justice or any court, magistrate, or to any member of the legislature, or to any officer or employee thereof, or to any other public officer or employee of this state or of any county or city, town, township thereof: First with intent to influence his vote, opinion, judgment, or decision on any question, matter, election, appointment, cause or proceeding, which may be then pending or may by law be brought before him in his official capacity, or to induce him to neglect or omit the performance of any official duty or to perform such duty with partiality or favor or otherwise than is required by law; or, second, in consideration that any such officer or member of the legislature has given any vote, opinion, judgment, or decision in any particular manner, or for any particular person, or upon any particular side or more favorable to one side than the other, in any matter, question, election, cause or proceeding, or has omitted to perform any official act or duty, or has performed such act or duty with partiality or disfavor,

or in anywise contrary to law, shall be deemed guilty of bribery, and be punished by imprisonment by the department of corrections for a term not exceeding seven years, or by confinement in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both the fine and confinement."

B. Section 558,090. Solicitation of bribe by public officer or employee, penalty.

Every judge or justice of any court, magistrate, member of the legislature, or officer of employee thereof, and any other public officer or employee of this state, or of any county or city, town, township, or school district therein, who shall, directly or indirectly, ask, or solicit, or propose, or offer to take or receive any gift, consideration, gratuity or reward: First, under any agreement that his vote, opinion, judgment or decision shall be given for any particular person, or in any particular manner, or upon any particular side, or more favorable to one side than the other in any election, matter, cause or proceeding which may be pending or be brought before him in his official capacity, or that he shall neglect or omit to perform any official duty to perform the same with partiality or favor, or otherwise than according to law; or second, for the performance of any duty imposed upon him by law; or third, in consideration that he will give his vote, opinion, judgment, or decision for any particular side, or more favorably to one side than the other; in any question, election, matter, cause or proceeding, or neglect or omit to perform any official act or duty with partiality or favor, or in anywise contract to law, shall be deemed guilty of a felony, ..."

15. There was at all times during the above action in full force and effect the following enacted revised statutes of the State of Missouri:

A. "Section 557.100 Juror or arbitrator accepting bribe. –

If any person summoned as a juror, or if any person chosen as an arbitrator or appointed a referee, shall take anything to give his verdict, award or report, or shall receive any gratuity or gift from any party to a suit, proceeding or prosecution, for the trial of which such person shall have been summoned or sworn as a juror, or for the hearing of which he shall have been chosen an arbitrator or appointed a referee, he shall, on conviction, be punished in the penitentiary not exceeding five years, or in the county jail not less than six months, or by fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

B. Section 557.100. Attempt to bribe juror or arbitrator.

Every person who shall corrupt, or attempt to corrupt, any other person summoned or sworn as a juror, appointed a referee or chosen an arbitratror, by giving or offering to give any gift or gratuity, whatsoever, with the intent to bias the mind of such juror, referee or arbitrator, or incline him to be more favorable to one side than the other, in relation to any case, matter or proceeding which may be pending in the court to which said juror shall have been summoned, or in which such referee or arbitrator shall have been chosen or appointed, shall on conviction be punished as in Section 557.100 is prescribed."

16. That during all legal proceedings that have taken place subsequent to the actions set forth above, the defendants, Wochner and Marino, have enjoyed the free and gratuitous legal services of the City Counselor of the City of St. Louis, though there was and has been at all times herein mentioned the following charter requirement of the said city:

"Article XVIII, Section 24. Legal remedies for payment of unauthorized compensation —

> The City counselor, or special counsel designated therefore by the board of aldermen, on complaint of any officer or employee of the City or of any taxpayer, shall prosecute, and of his own motion may prosecute, such action as may be appropriate to restrain the payment of salary or other compensation to any person appointed to or holding any position in violation of any of the provisions of this article or the rules and ordinances thereunder, or to recover any payment so made, and such right shall not be limited or denied by reason of the fact that such position shall have been classified as, or determined to be, not subject to competitive tests. All money recovered in any action brought under the provisions of this section shall when collected, be paid into the treasury of the City."

17. Plaintiffs state the unlawful acts engaged in by the defendants Wochner and Marino under the color of state law were done wilfully, maliciously, oppressively, unlawfully, and corruptly; and against the interests and rights of plaintiffs, and each of them; that said acts violated plaintiffs' rights of due process of law, impaired their rights, privileges, and immunities secured and guaranteed under the Constitution of the United States of America.

18. That all of the parties holding office, either elective or appointive within and under the laws of the State of Missouri, and the City of St. Louis, are charged with the legal responsibility and obligation of enforcing the cited statutes and ordinances. Further, though they were aware of the facts and allegations set forth above, they and each of them, have refused and declined to assert the duties of their office in pursuing the enforcement of said statutes and ordinances to the harm, detriment and loss of rights, privileges, and immunities as granted by the U.S. Constitution; all of which has

resulted in the denial to plaintiffs of a suitable and impartial forum for the protection of said rights, privileges and immunities.

19. The failure, default, and abdication of authority by the parties charged with proper enforcement of law is not a bar to the pursuit of the herein claimed remedy. Section 537.050 of the Revised Statutes of the State of Missouri states:

"537.050. Civil action not merged in criminal prosecution.–

> In no case shall the right of action of any party injured by the commission of any felony or misdemeanor be deemed or adjudged to be merged in such felony or misdemeanor; but he may recover the amount of damages sustained thereby in an action to be brought before any court or tribunal of competent jurisdiction."

20. A. That the oppression of office, malicious and unlawful conduct engaged in by the defendants Wochner and Marino is continuing and ongoing in nature and scope and as a result thereof, as to plaintiff Gore; she has been directly caused to suffer the following actual damages, to-wit: she has been deprived of her rightful salary since 1973 in the sum of One Hundred Twenty-Five Thousand ($125,000.00) Dollars; she has been reduced in her rights of pension and retirement in an amount yet to be determined; as an integral part of her compensation she was afforded a rent free apartment, denied to her since the year 1974 at a loss of Twelve Thousand ($12,000.00) Dollars; loss of the protection of insurance and health care rights for which she has had to personally assume in the sum of Seven Thousand ($7,000.00) Dollars; loss of her professional reputation within the medical and general community, the vindication of which has been denied her, to her damage of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

B. That the oppression of office and unlawful and maliciuos conduct engaged in by the defendants Wochner and Marino and complained of above is continuing and ongoing in nature and scope and as a result thereof, as to plaintiff Robinson; and she has been directly caused to suffer the following actual damages, to wit: she has been deprived of her rightful salary since 1973 in the sum of One Hundred Thousand ($100,000.00) Dollars; she has been reduced in her rights of pension and retirement in an amount yet to be determined; loss of protection of insurance and health care rights for which she had had to personally assume in the sum of Seven Thousand $7,000.00) Dollars; loss of her professional reputation within the medical and general community, the vindication of which has been denied her, to her damage of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

WHEREFORE, the above premises considered, plaintiff Minnie Gore prays actual damages against the defendant R. Dean Wochner, M.D. and Charles Marino and each of them jointly and severally the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, actual damages and One Million ($1,000,000.00) Dollars punitive damages, that plaintiff Jennye Robinson, the above premises considered, prays actual damages of Two Hundred Fifty Thousand ($250,000.00) Dollars and punitive damages of One Million ($1,000,000.00) Dollars; further, that plaintiffs and their attorney be awarded a reasonable sum of money to adequately compensate them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42, U.S.C. 1988.

COUNT VI

COMES NOW plaintiffs and for Count VI of their petition state as follows, to-wit:

1. Plaintiffs hereby incorporate by reference paragraphs one through 20 of Count V of plaintiffs' petition as though the same were set forth herein.

2. That the defendant, John Bass was on June 19, 1973 the duly elected and authorized Comptroller of the City of St. Louis, and was charged with the obligations of said Office during the period here in question.

3. That there was in full force and effect the following rules as part of the Civil Service Rules, to-wit: Rule XVI

"*Section 1.* AUDIT BY COMPTROLLER:

> Prior to payment of any selary, wage, compensation, claim, or account for personal services by Treasurer or any other disbursing officer, the Comptroller or person designated by him shall certify that the persons named on the payroll or account have been lawfully employed in a position duly authorized and are entitled to payment for actual service in such position or authorized absences therefrom, at the rates, for the periods, and in the amounts covered by such payrolls or accounts. The Comptroller shall not approve any item of a payroll or account of any employee nor issue his warrant for any payment therefor, except on evidence satisfactory to him that employment complies with the points stipulated above."

"*Section 2.* NOTICE TO COMPTROLLER:

> (a) Personnel information' The Director shall esttablish procedures for notifying the Comptroller without delay, of any new positions, new employees, changes in pay or

status, and attendance and absence of employees and of his approval or disapproval of such actions to be used as basis for the conduct of the audit specified in Rule XVI, Section 1. He shall, if so requested by the Comptroller, make available the official roster for the purpose of making such audits.

(b) Violation of Compensation Plan: :Whenever the Director finds that any person is employed or is proposed to be paid as an employee in the classified service in any amount not provided for under the provisions of Article XVIII and any rules and ordinances in effect not inconsistent therewith, he shall so notify the Comptroller. After such notice the Comptroller shall not approve any further payment to such person except in accordance with such provisions."

Rule XVI. Audit of Payrolls.

4. Further, that there was in full force and effect the following Article XV, Section 2 of the Charter of the City of St. Louis, to-wit:

"*Section* B. The Comptroller. — .... The Comptroller shall be head of the department of finance and exercise a general supervision over its divisions, over all the fiscal affairs of the city and over all its property, assets and claims, and the disposition thereof. .... He shall be the general accountant and auditor of the city and the records in his office shall show the financial operations and condition, property assets, claims and liabilities of the city, all expenditures authorized, and all contracts in which the city is interested. He shall require proper fiscal accounts, records, settlements and reports to be kept, made and rendered to him by the several departments and offices of the city, ... Except by this charter or by law or ordinance otherwise provided he shall prescribe and regulate the manner of paying creditors, officers and employes of the city. He shall audit all payrolls, accounts and claims against the city , and certify thereon the balance as stated

by him and draw his warrant on the treasurer therefor, but no payroll account or claim, or any part thereof, except for the preservation of the credit of the city, or in case of extraordinary emergency as hereinbefore provided, shall be audited against the city unless certified by the officer having knowledge of the facts and authorized by law or ordinance, and the amount required for payment of the same appropriated for that purpose by ordinance and in the treasury . . . ."

5. That there was imposed upon the Comptroller as a result of the above an affirmative obligation of reasonable inquiry concerning the absence of plaintiff Robinson's name upon certified payrolls submitted to the defendant Bass for all periods subsequent to August 1, 1973, a date after plaintiff Robinson's last scheduled pay period; likewise, said obligation of reasonable inquiry existed concerning the absence of plaintiff Gore's name upon certified payrolls after January 1, 1974. Further, the said obligation of reasonable inquiry as stated above arose by virtue of the following specific language of the Civil Service Rules:

(a) Personal Information: The Director shall establish procedures for notifying the Comptroller without delay, of any new positions, new employees, *change in pay or status,* and attendance and absence of employees *and of his approval or disapproval of such actions* to be used as basis for the conduct of the audit specified in Rule XVI, Section 1. (pleaders' emphasis) Rule XVI Sec. 2(a)

6. Due to the failure of the defendant Scearce to have made the necessary and proper investigation as set forth above, there was as a result thereof no directive of approval or disapproval as required above at the time the said plaintiffs' names were absent and missing from the certified payroll; said Rule places an affirmative obligation upon the Comptroller of reasonable inquiry at the time there is, inter alia, a change in pay or status.

7. Said act of affirmative reasonable inquiry is clearly imposed upon defendant Bass by the following sentence of the same rule, to-wit:

> "He (Scearce) shall, if so requested by the Comptroller, make available the official roster for the purpose of making such audit." Rule XVI Sec. 2(a)

8. That despite the obligation of reasonable inquiry ar heretofore stated plaintiffs state that the defendant Bass was negligent in the conduct of his office to the detriment of plaintiffs in one or more of the following ways:

A. That the defendant Bass failed to require defendant Scearce to faithfully, accurately, and fully comply with said rule, by his (Bass's) permitting the filing of an incomplete and, therefore, inaccurate audit by defendant Scearce which failed to satisfy the requirements of the rule stated above and thereafter failed or refused to inquire as to how it was incomplete.

B. That defendant Bass knowing full well the inadequateness of the audit as filed by defendant Scearce, permitted and tolerated the same without objection, and was thereby negligent.

9. As a result of the above the defendant Bass approved the payrolls and accounts as submitted without demanding the defendant Scearce comply with this duty, thereby directly and proximately causing plaintiffs, and each of them, a loss of their right to having a proper investigation of the properiety of the appointing authorities act of terminating said plaintiffs. Further, the defendant Bass should have refused to issue his warrant for the payment of any payroll or account until a proper submission of audit was made by defendant Scearce as required.

10. As a direct and proximate result of defendant Bass's negligence as set forth above, the plaintiffs and each of them were injured and damaged in an amount equal to the loss of their respective salaries from the date of said negligent acts, namely August 1, 1973 and June 1, 1974, respectively, as avered until October 20, 1975, in the sum of Thirty Five Thousand ($35,000.00) Dollars as to plaintiff Robinson, and Forty Five Thousand ($45,000.00) Dollars as to plaintiff Gore.

WHERETOFORE, plaintiff Robinson prays special damages against the defendant Bass individually and in his official capacity as Comptroller for the City of St. Louis for her lost wages in the sum of Thirty-Five Thousand ($35,000.00) Dollars, from August 1, 1973 to October 20, 1975; for actual damages for her humiliation and disgrace professionally and personally in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars, and punitive damages in the sum of Two Hundred Twenty-Five Thousand ($225,000.00) Dollars; plaintiff Gore prays special damages in the sum of Forty-Five Thousand ($45,000.00) Dollars lost wages from January 1, 1974 to October 20, 1975, and actual damages for her humiliation and disgrace in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars, punitive damages in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars; further, that plaintiffs and their attorney be awarded a reasonable sum of money to adequately compensate them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

COUNT VII

COMES NOW the plaintiffs and for their cause of action in Count VII state and aver as follows, to-wit:

1. Plaintiff incorporated herein as plead paragraph one through ten of Count VI.

2. There was at all times here mentioned in full force and effect the following provisions of the Charter of the City of St. Louis, to-wit:

"ARTICLE XVIII. Civil Service

Section 1. Definitions. – The terms defined in this section, when used in this article, have the following meanings except where the context clearly requires otherwise:

(a) "Appointing Authority" means any person or group of persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the city service.

(b) "City Service" or "service of the city" means all tions as herein defined, that are subject to control and regulation by the City of St. Louis as a municipal corporation or any of its officers or other agencies as such.

(c) "Class" or "class of positions" means a definitely recognized kind of employment in the classified service designed to embrace all positions sufficiently alike to be treated alike.

(d) "Classified service" means all positions in the city service except those specifically placed in the unclassified service as herein defined.

(e) "Compensation" means the salary, wages, fees, allowances and all other forms of valuable consideration, earned by or paid to any employee by reason of service in any position, but does not include any allowances for expenses authorized and incurred as incidents to employment.

(f) "Competitive position" means any position in the classified service not expressly designated as an excepted position in this section.

(h) "Excepted position" means any position in the classified service not subject to the provisions of this article requiring competitive tests of fitness for appointment and such other provisions as, by their terms, apply specifically to competitive positions alone. All such positions, however, shall be subject to all the other provisions of this article insofar as consistent with law and with this exception. Thhe following described positions, and no other, shall be deemed to be excepted positions:

(1) all positions filled by election by the people;

(2) all positions of heads of principal departments and of independent agencies, that are filled by appointment by the mayor;

(3) one position of executive secretary and one position of secretary and stenographer to the mayor;

(4) all positions of paid members of the boards;

(5) all officers and employes of the board of aldermen.

(m) "Unclassified service" means all positions not subject to the provisions of the charter, ordinances and civil service rules relating exclusively to positions in the classified service, and includes positions, as follows, and no others:

(1) all positions of members of boards, commissions or committees serving without compensation;

(3) all other positions in which services are rendered without compensation;

(3) all officers and employes of the board of aldermen.

3. There was at all times hereinafter mentioned in full force and effect the following provisions of the Charter of the City of St. Louis, to-wit:

"Article XVIII, Section 3. Scope of Civil Service Rules – To give effect to the purpose and requirements set forth in the

next preceeding section, the Civil Service Rules hereinafter required to be adopted shall provide for the following things, among others, with relation to the classified service as defined herein:

(q) Roster of employes.| — For maintenance of a complete official roster of employes showing for each employer, his name, address, class title, rate of pay, and changes in any of them, and such other information as may be deemed desirable.

(s) Reports by appointing officers. — For reports by appointing officers of new positions and changes in the and of attendance and absence, which upon approval by the director shall form basis for audit and approval of payrolls by the comptroller as to compliance with this article and the rules and ordinances thereunder."

4. That as a result of the above and foregoing rule-making authority, the following Rules was properly adopted and were at all times here mentioned in full force and effect, to-wit, Civil Service Rules, Rule XVI

"*Section 1.* AUDIT BY COMPTROLLER:

Prior to payment of any salary, wage, compensation, claim, or account for personal services by Treasurer or any other disbursing officer, the Comptroller or person designated by him shall certify that the persons named on the payroll or account have been lawfully employed in a position duly authorized and are entitled to payment for actual service in such position or authorized absences therefrom, at the rates, for the periods, and in the amounts covered by such payrolls or accounts. The Comptroller shall not approve any item of a payroll or account of any employee nor issue his warrant for any payment therefor, except on evidence satisfactory to him that employment complies with the points stipulated above."

"*Section 2.* NOTICE TO COMPTROLLER:

(a) Personnel information: The Director shall establish procedures for notifying the Comptroller without delay,

of any new positions, new employees, changes in pay or status, and attendance and absence of employees and of his approval or disapproval of such actions to be used as basis for the conduct of the audit specified in Rule XVI, Section 1. He shall, if so requested by the Comptroller, make available the official roster for the purpose of making such audits.

(b) Violation of Compensation Plan: Whenever the Director finds that any person is employed or is proposed to be paid as an employee in the classified service in any amount not provided for under the provisions of Article XVIII and any rules and ordinances in effect not inconsistent therewith, he shall so notify the Comptroller. After such notice the Comptroller shall not approve any further payment to such person except in accordance with such provisions." Rule XVI. Audit of Payrolls.

5. That as a direct result of a certain corrupt and illegal agreement between defendants Wochner and Marino, as previously described, the defendant Marino ostensibly became a "new employee" as described by the Civil Service Commission Rules, and that additionally as a condition of certification on the payroll the name of defendant Marino would have had to appear on the Roster of Employees defined above.

6. That the defendant Scearce was wilfully and intentionally negligent in the operation of the Department of Personnel by permitting the name of defendant Marino to appear on the list of personnel of the City of St. Louis, certified for payroll, as stated in said Civil Service Rules and Regulations when he, defendant Scearce, knew or should have known that said defendant Marino did not qualify as holding a position in the classified service, or any excepted position or unclassified service heretofore defined.

7. That as a direct and proximate result of the wilfull and intentional acts of the defendant Scearce in his failure to per-

form the duties of his office, the corrupt and unlawful fiscal arrangement between defendants Wochner and Marino was not terminated; that as a result of defendant Scearce's negligence, he did ratify, condone, and adopt the payroll certification of defendant Marino as proper, and by his official acts of certifying said payroll demonstrated a policy, custom, and usage of his office that favored and promoted a selective, arbitrary and capricious enforcement of the Charter of the City of St. Louis, and the Civil Service Rule adopted pursuant thereto; all to the harm, detriment, and damage of plaintiff's rights, privileges and immunities secured and guaranteed by the Constitution of the United States of America.

WHERETOFORE, plaintiff Robinson prays special damages against the defendant Scearce individually and in his official capacity as Comptroller for the City of St. Louis for her lost wages in the sum of Thirty-Five Thousand ($35,000.00) Dollars, from August 1, 1973 to October 20, 1975; for actual damages for her humiliation and disgrace professionally and personally in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars, and punitive damages in the sum of Two Hundred Twenty-Five Thousand ($225,000.00) Dollars; plaintiff Gore prays special damages in the sum of Forty Thousand ($40,000.00) Dollars lost wages from January 1, 1974 to October 20, 1975, and actual damages for her humiliation and disgrace in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars, punitive damages in the sum of Two Hnurded and Twenty-Five Thousand ($225,000.00) Dollars; further, that plaintiffs and their attorney be awarded a reasonable sum of money ot adequately compensate them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42, U.S.C. 1988.

COUNT VIII

COMES NOW the plaintiffs and for Count VIII of their petition state as follows, to-wit:

1. Plaintiffs replead and incorporate herein as plead paragraphs one through seven of Count VII of said peititon.

2. Defendant John Bass continued in his capacity as Comptroller of the City of St. Louis as aforementioned until April, 1977 at which time he was succeeded by the duly-elected Comptroller of the City of St. Louis, Raymond Percich.

3. Defendant Raymond Percich is a resident of the City of St. Louis, State of Missouri and resides within the jurisdiction of this court and is here sued both individually and in his official capacity as the duly-elected Comptroller of the City of St. Louis, State of Missouri.

4. That the Comptroller had the duty under said City Charter and Rule XVI of the Civil Service Rules, of reasonable inquiry concerning the presence of defendant Marino's name upon certified payrolls sumbitted to the defendant Bass for all periods subsequent to October 20, 1975 to the date after defendant Marino's first scheduled pay period. The said duty of reasonable inquiry as stated is by virtue of the following:

> (a) Personal Information: The Director shall establish procedures for notifying the Comptroller without delay, of any new positions, new employees, *change in pay or status,* and attendance and absence of employees *and of his approval or disapproval of such actions* to be used as basis for the conduct of the audit. Sepcified in Rule XVI Section 1. (pleaders' emphasis)

5. There was in full force and effect the following provision of the Charter of the City of St. Louis, being part of Article XV, Section 2.

> "....Except as by this charter or by law or ordinance otherwise provided he shall prescribe and regulate the manner of paying creditors, officers and employes of the city. He shall audit all payrolls, accounts and claims against the city, and certify thereon the balance as stated by him and draw his warrant on the treasurer therefor, but no payroll, account or claim, or any part thereof, except for the preservation of the credit of the city, or in case of extraordinary emergency as herein before provided, shall be audited against the city unless certified by the officer having knowledge of the facts and authorized by law or ordinance, and the amount required for payment of the same appropriated for that purpose by ordinance and in the treasury...."

6. Due to the failure of the defendant Scearce to investigate as set forth above, there was a result thereof no directive of approval or disapproval as required above at the time the said plaintiffs' names were absent and missing from the certified payroll; and that said Charter provision and Rules places an affirmative obligation upon the Comptroller of reasonable inquiry at any time there is, inter alia, a new employee upon the certified payroll.

7. Said act of affirmative reasonable inquiry is clearly imposed upon defendant Bass by the following sentence of the same rule, to-wit:

> "He (Scearce) shall if so requested by the Comptroller, make available the official roster for the purpose of making such audit."

8. That defendant Bass was negligent in failing to make reasonable inquiry, as heretofore stated, in the conduct of his office to the detriment of plaintiffs.

Further, that had the defendant Bass made reasonable inquiry as required; he would have known or should have known that said defendant Marino was not an employee of the City of St. Louis in either the classified service as hereafter defined, nor was he employed in the "unclassified service" as hereafter defined.

9. Article XVIII, Section 1 (b,c, and d) of the Charter of the City of St. Louis, entitled Civil Service, states as follows, to-wit:

> "Section 1. Definitions.—The terms defined in this section, when used in this article, have the following meanings except where the context clearly requires otherwise:
>
> (b) "City service" or "service to the city" means all positions as herein defined, that are subject to control and regulation by the City of St. Louis as a municipal corporation of any of its officers or other agencies as such.
>
> (c) "Class" or "class of positions" means a definitely recognized kind of employment in the classified service designed to embrace all positions sufficiently alike to be treated alike.
>
> (d) "Classified service" means all positions in the City service except those specifically placed in the unclassified service as herein defined."

10. Article XVIII, Section 1(m) of the Charter of the City of St. Louis, states as follows, to-wit:

> (m) "Unclassified service" means all positions not subject to the provisions of the charter, ordinances and civil service rules relating exclusively to positiions in the classified service and includes positions, as follows and no others:
>
> (1) all positions of members of boards, commissions or committees serving without compensation;
>
> (2) all other positions in which services are rendered without compensati .on

(3) all officers and employes of the board of aldermen.

11. That the above an foregoing definations of classified and unclassified service are mutually exclusive in nature, scope and effect, and that the defendant Bass's failure to inquire caused him to make payment to the defendant Marino without proper authority or authorization.

12. That the only manner of payment contemplated or authorized by the Charter of the City of St. Louis, other than the categories heretofore stated, is by contract between the City of St. Louis and a contracting party. That said contract relationships are for all purposes subject to the provisions of Article XXV Section 9, of the Charter of the City of St. Louis, which reads as follows, to-wit:

> "Section 9. Execution of City's contracts. — All contracts relating ot city affairs shall be in writing, signed and executed in the name of the city. In cases not otherwise provided by law or ordinance, they shall be made by the comptroller, and in no case by the board of aldermen or any committee thereof. Contracts not made by the comptroller shall be countersigned by him, and all contracts shall be filed and registered by number, date and contents with the register."

13. That since the defendant Bass neither authorized or approved any type of employment or consultant contract between the City of St. Louis and the defendant Marino, now was any such contract on file in the office of the City Register as provided; the defendant Bass's investigation as required and provided by said Civil Service Rules would have revealed that defendant Marino was not properly or legally an employee of the City of St. Louis, since proported position held by defendant Marino was not within the classified positions of the City of St. Louis, and the alleged contract, plaintiffs exhibit "A" was nothing more than a personal retainer agreement between Wochner and Marino.

14. That as a direct and proximate result of the above and foregoing negligence of defendant Bass in his failure to perform the duties of his office, the corrupt and unlawful fiscal arrangement entered by defendants Wochner and Marino was not brought to an end. Further, that, as a result defendant Bass ratified and adopted the payroll certification of defendant Marino in his official capacity, demonstrating his acquiesence in the selective enforcement of the Charter of the City of St. Louis, ordinances exacted in pursuance thereof, and the Rules of the Civil Service Commission; and that the arbitrary, capricious, and high handed manner in which the Director of Personnel operated said Department was thereby approved by the defendant Bass, who thereby adopted and ratified the manner, custom, usage, and policy of said Director of Personnel in the management of his office and in his administration of the Department of Personnel.

15. That defendant Bass continued to negligently, and carelessly fail to perform the duties of his office to April, 1977 when the citizens of the City of St. Louis, State of Missouri, voted in his successor Raymond Percich, as Comptroller of the City of St. Louis, State of Missouri.

16. That Defdenant Percich, upon assuming the duties and responsibilities of his position as Comptroller of the City of St. Louis, State of Missouri in April, 1977, represented and stated that he was familiar with all aspects of the duties and responsibilities of his office and was aware and informed of the City of St. Louis, State of Missouri fiscal conditions. Fur ther, he represented that the accounts of his office conformed with the requirements of the aforementioned Charter requirements, odinances enacted pursuant thereto.

17. That by said statements and assertations defendant Percich admitted that he had actual or constructive knowledge of the negligence of defendant Scearce in the fulfillment of his

duties as herein plead concerning the corrupt and illegal employment of defendant Marino. Further, that as a result defendant Percich ratified and adopted the payroll certification of defendant Marino in his official capacity, demonstrated a similar acquiesence in and adoption of the custom, usage, and policy as alleged against his predecssor in time, defendant Bass, with respect to the conduct of his office.

WHERETOFORE, plaintiff Robinson prays special damages against the defendant Bass and defendant Percich and each of them individually and in his official capacity, for her lost wages in the sum of Thirty-Five Thousand ($35,000.00) Dollars, from August 1, 1973 to October 20, 1975; for actual damages for her humiliation and disgrace professionally and personally in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars, and punitive damages in the sum of Two Hundred Twenty-Five Thousand ($225,000.00) Dollars; plaintiff Gore prays special damages in the sum of Thirty-Six Thousand ($36,000.00) Dollars lost wages from January 1, 1974 to October 20, 1975, and actual damages for her humiliation and disgrace in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars, punitive damages in the sum of Two Hundred and Twenty-Five Thousand ($225,000.00) Dollars; further, that plaintiffs and their attorney be awarded a reasonable sum of money to adequately compensated them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

COUNT IX

COMES NOW plaintiffs and for Count IX of their petition state as follows, to-wit:

1. Plaintiffs hereby incorporate by reference paragraphs one through seventeen of Count VIII of plaintiffs' petition as though the same were set forth herein.

2. There was at all times here mentioned in full force and effect the following statutes of the State of Missouri, namely Section 73.470 R.S.Mo. (1969), which states as follows:

> 73.470. Officers shall take oath – Mayor to issue certificate – certain officers to give bond –
>
> Every officer of the City, before entering upon the duties of his office, shall take and subscribe to an oath before some officer of the law authorized to administer oaths as prescribed by the constitution of this State for civil officers, and that he will faithfully support all laws and ordinances of the city. The Mayor shall then issue to such officer a certificate of election or appointment, and such oath shall be endorsed thereon or attached thereto. Every officer, except the Mayor, councilmen, and police judge, shall, before entering upon the duties of his office, give bond to the city in such sum as may be prescribed by ordinance, unless otherwise prescribed by this chapter. Said bond shall be approved by the comptroller and filed with the city clerk. For any breach of the condition of said bond, suit may be instituted thereon by the city, or by any person or persons claiming to have been injured by reason of such breach, in the name of such city, for the use of such person or persons."

3. That plaintiffs here allege and avert that they have caused the institution of this complaint to be brought by the State of Missouri by their relation due to the following duly enacted statutes of the State of Missouri:

A. "522.010. Persons injured may proceed against principals or sureties, how – Persons injured by the neglect or misfeasance of any officer may proceed against such principal or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury."

B. "522.020. Suits on official bonds – in whose name to be brought in – In all cases where, by the law of this state, any person is authorized to prosecute a suit to his own use, on any official bond, he shall sue in the name of the state, or other obligee named in the bond, stating the process, pleadings, proceedings and record in such action, that the same is brought at the relation and to the use of the person so suing."

4. That the defendant Poelker during his term of office (1973-1977) and his successor of title as Mayor, defendant Conway, though required and mandated under the above statute to require the posting of a bond for all appointees, failed and neglected to require compliance with the above statute and wilfully and intentionally ignored same.

5. That as a direct and proximate result of the failure of said defendants Poelker and Conway to require compliance with the above cited statutes, the plaintiffs have suffered a loss of opportunity to enforce their grievances against the entity, that by statute should be legally obligated to said plaintiffs, as a result of the wilful neglect of said aforementioned defendants as alleged in Count I through Count VIII.

WHEREFORE, the premises considered, plaintiffs pray judgment against the defendants Poelker and Conway individually and in their official capacity in the sum of One Hundred and Thirty-Five Thousand ($135,000.00) Dollars as to plaintiff Robinson; the sum of One Hundred and Forty Thousand ($140,000.00) Dollars as to plaintiff Gore; further, that plaintiffs and their attorney be awarded a reasonable sum of

money to adequately compensate them for the cost, time and expense of bringing this action as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

COUNT X

COMES NOW pliantiffs and for Count X of their petition state as follows, to-wit:

1. Plaintiffs hereby incorporate by reference paragraphs one through five of Count IX of plaintiffs' petition as though the same were set forth herein.

2. All herein named defendants to-wit: R. Dean Wochner, M.D., Fred Gould, David V. Essex, Sr., Charles Marino, John Poelker, John Bass, R. Elliott Scearce, James Conway, Raymond Percich, William Duffe, Robert Cummings, The City of St. Louis, The Civil Service Commission, and The Department of Personnel, are former or present holders of elective or appointive office under the Charter of the defendant City of St. Louis and were at all times here mentioned acting under color of state law.

3. This count is for declaratory and injunctive relief and for damages. The rights, privileges and immunities sought to be declared and redressed are those secured by and through the Fourteenth Amendment to the United States Constitution.

4. This Count seeks a judgment declaring that the custom, usage, and policy of the defendants in their agreed to and selective use of the Charter, Ordinances and Rules above cited contervenes the constitutional rights, privileges and immunities of plaintiffs. This proceeding also seeks an injunction against said individuals, and said defendant City, enjoining them from their agreed-upon selective, arbitrary and capricious

use in the administration of the cited Charter, Ordinances and Rules as well as damages resulting from said practices which have become the custom, policy, and usage of said City.

5. Despite the truth and knowledge of facts plead and contained in the foregoing Counts of this petition, all of which were known to the named defendants, they have refused and continue to refuse to correct, rectify, or change the administration of the cited charter ordinances and rules, which by all of the defendants use thereof have become the policy, usage, and custom of said City which has affected plaintiffs'.

6. All named defendants aforementioned acted under the color of law as agents and employees of said City in their refusal to correct, rectify, or alter the termination of plaintiffs and they thereby deprived plaintiffs of the rights, privileges and immunities secured to them by the First and Fourteenth Amendments to the Constitution.

7. As a direct and proximate result of the acts as set forth plaintiffs have been denied a legal, objective, and unbiased forum in which to adjudicate their innocence of the serious charges as leveled by Dr. Wochner, and have been directly damaged by the failure of the aforementioned office holder to fulfill their Charter and Ordinance duties and obligations of their respective offices as previously plead; all of which inure to the detriment of the plaintiffs' due to the activities complained of since June 1973 when the unsubstantiated charges were preferred by Dr. Wochner.

8. Plaintiffs Robinson and Gore have loss wages due them in the following approximate amounts:

	Gore	Robinson
1973	————	$ 8,000.00
1974	$ 12,000.00	$ 12,000.00
1975	$ 20,000.00	$ 18,500.00
1976	$ 22,000.00	$ 19,000.00
1977	$ 24,000.00	$ 20,000.00
1978	$ 24,000.00	$ 20,000.00
	$102,000.00	$102,500.00

9. Money damages alone cannot remedy the irreparable harm done by the plaintiffs' loss of privileges and immunities, due process of law as well as the denial of equal protection of the laws described above. No adequate remedy exists at law for redress of those deprivations which continue to occur and will occur in the future unless enjoined by this court.

10. An emergency exists in that the continual denial of the rights to the due process and equal protection of laws which have already irrevocably deprived plaintiffs of their job security and employment positions as stated and that some future resoration of rights cannot adequately restore or compensate plaintiffs, and particularly plaintiff Gore who faces a mandatory retirement; but, further, that the stigma of their dismissal, coupled with the continual denial of their constitutional protected rights to a fair and impartial hearing, has cast them into a void of unemployability by the very nature of their profession and calling which said fact cannot be relieved saved by this court.

WHEREFORE, plaintiffs demand judgment:

1. Declaring the actions of the aforementioned defendants, the City of St. Louis its departments and its agency, in refusing plaintiffs reemployment or restoration of pay until a duly qualified hearing is structured to redress their grievances as provided by law, are acts done under color of law, are illegal and unconstitutional;

2. Entering a plenary and permanent injunction directing and enjoining the City of St. Louis, their agents, employees, and all persons, in active concert and participation with them, from the selectively, arbitrarily, capriciously, and illegally enforcing the Charter, Ordinances, and Rules of the said City that have by the acts of the defendants became the custom, policy, and usage of said City in the application of said Charter, Ordinances, and Rules.

3. Award damages in the amount of One Hundred and Five Thousand ($105,000.00) Dollars to each plaintiff for their current salary losses to date.

4. Further, to reinstate plaintiffs to their former positions with the Department of Health and Hospitals within the City of St. Louis, State of Missouri, with commensurate pay and allowances to date as if they had been employed in the interim, restoration of fringe benefits, including but not limited to their respective pension rights.

5. Award plaintiffs the reasonable cost of this action including attorney fees, as provided for by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. 1988.

6. Granting plaintiff such other and further relief as may be deemed just and proper.

Respectfully submitted,

By: STEPHEN J. NANGLE/ss/
Co-Counsel for Plaintiffs
226 South Meramec, Suite 204
Clayton, Missouri 63105
(314) 725-4114

and

JOHN J. RELLES
Co-Counsel for Plaintiffs
1108 Olive
St. Louis, Missouri 63141
(314) 421-4242

Plaintiffs' Exhibit "A"

City of St. Louis

DEPARTMENT OF HEALTH AND HOSPITALS

OFFICE OF THE DIRECTOR

1625 South 14th Street — St. Louis, Missouri 63104

John H. Poelker, *Mayor* R. Dean Wochner, *Director*

October 17, 1975

Mr. Charles J. Marino
7161 Lindenwood Ave.
St. Louis, Missouri 63109

Dear Mr. Marino:

This is to confirm our agreement under which you are to be retained as an Executive Assistant on my staff. This position is to have a salary equivalent to an annual wage of $17,000 per yer, paid on a bi-weekly basis, and the duration of this agree-

ment is indefinite at the present time. In this position, you will report directly to me, and the responsibilities will be those as outlined in the attached job description.

I look forward to working with you in this role and I am sure it will be of assistance to our entire Department as we attempt to provide better solutions to some of the problems we have been experiencing in providing patient care.

Please indicate your agreement to this arrangement by signing in the space provided below.

Sincerely,

/s/ R. DEAN WOCHNER, M.D.
R. Dean Wochner, M.D., Director
Department of Health and Hospitals

RDW:gp

Enclosure

/s/ CHARLES J. MARINO
Charles J. Marino

cc–Hon. John H. Poelker, *Mayor*